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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON III, PETITIONER

v.

WILBER M. BRUCKER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY

No. 141

HOWARD D. ABRAMOWITZ, PETITIONER

v.

WILBER M. BRUCKER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

No. 80. The opinion of the United States District Court for the District of Columbia (H. R. 99–104) [1]

[1] Record references in No. 80 (*Harmon*) are designated "H. R. ——", and in No. 141 (*Abramowitz*) are designated "A. R. ——". References to the briefs of petitioners Harmon and Abramowitz will be designated "H. Br. ——" and "A. Br. ——" respectively. The respective petitioners will be referred

is reported at 137 F. Supp. 475. The opinions in the United States Court of Appeals for the District of Columbia Circuit (R. 116–138) are reported at 243 F. 2d 613.

No. 141. The order of the United States District Court for the District of Columbia granting summary judgment (A. R. 22) was entered without opinion. The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (A. R. 23) is reported at 243 F. 2d 834.

JURISDICTION

No. 80. The judgment of the Court of Appeals (H. R. 139) was entered on January 31, 1957. The petition for a writ of certiorari was filed on February 15, 1957, and was granted on May 13, 1957 (H. R. 140). 353 U. S. 956.

No. 141. The judgment of the Court of Appeals (A. R. 24) was entered on April 26, 1957. The petition for a writ of certiorari was filed on May 27, 1957, and was granted on June 17, 1957 (A. R. 25). 354 U. S. 920.

In both cases, the jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Courts have jurisdiction to review the administrative issuance of military discharges.

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to by name; since the Secretary of the Army is the respondent in both cases, he will be referred to as "respondent" or "the Secretary". In order to avoid confusion with the record references, Army Regulations will be cited as "Army Reg. —" rather than the usual reference, "A. R. ——".

2. Whether the Secretary of the Army has statutory authority to discharge enlisted personnel whose retention in the Army is determined not to be clearly consistent with the interests of national security, and to issue certificates of General Discharge (under honorable conditions) or Undesirable Discharge to personnel so discharged.

3. Whether the action of the Secretary of the Army, taken under the applicable Army security regulations, in issuing a General Discharge (under honorable conditions) to Harmon and an Undesirable Discharge to Abramowitz, causes the petitioners any legally remediable injury.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 14; Article 1, Section 9, Clause 3; Article II, Section 2, Clause 1; and the First, Fifth, and Sixth Amendments to the Constitution of the United States. The statutes involved are Section 1 of Chapter II of the Act of June 4, 1920, 41 Stat. 809, as amended, 10 U. S. C. 652a;[2] Section 4 (b)

[2] Now 10 U. S. C. (Supp. IV) 3811. The provisions of former Title 10, together with numerous provisions relating to the Armed Forces previously codified in other titles of the Code, were repealed, revised and reenacted as Title 10 by the Act of August 10, 1956, Sec. 53, published as volume 70A of the Statutes at Large. Although some wording has been altered for purposes of clarity, "[t]he object of the new [title] has been to restate existing law, not to make new law". H. Rep. 970, 84th Cong., 1st sess., p. 8. S. Rep. 2484, 84th Cong., 2d sess., p. 19. The statutes listed above as being directly involved in this case will be referred to throughout this brief by their former citations,

of the Universal Military Training and Service Act, 62 Stat. 606, as amended, 50 U. S. C. App. 454 (b); Sections 248 and 249 of the Armed Forces Reserve Act of 1952, 66 Stat. 495, 50 U. S. C. 991 and 992;[3] Section 301 of the Servicemen's Readjustment Act of June 22, 1944, 58 Stat. 286, as amended, 38 U. S. C. 693h; Section 207 of the Legislative Reorganization Act of August 2, 1946, 60 Stat. 837, as amended, 5 U. S. C. 191a;[4] and Section 5 of the National Security Act Amendments of 1949, 63 Stat. 580, as amended, 5 U. S. C. 171a (c) (4). The regulations involved are Department of Defense Directive 5210.9 and portions of Army Regulation 604–10. With the exception of Defense Directive 5210.9, which is set forth in full at pp. 33–45 of the Record in *Harmon,* and Army Regulation 604–10, which is printed as an Appendix to petitioner Abramowitz's brief (A. Br. 37–50), the foregoing provisions are set forth in Appendix A, *infra,* at pp. 77–81.

STATEMENT

Both of these cases are suits to review the action of the Secretary of the Army in issuing military discharges less than honorable and to compel him to issue Honorable Discharges to petitioners. The only significant differences are two: first, Harmon (No. 80) has been discharged with a General Discharge (under

since the texts set forth are those in effect at the time these actions were commenced. Other statutes referred to, if recodified, will, as a general rule, be cited according to the sections of Title 10 into which they are presently codified.

[3] Now 10 U. S. C. (Supp. IV) 1162 and 1163.

[4] Now 10 U. S. C. (Supp. IV) 1552.

honorable conditions) in lieu of the Undesirable Discharge originally issued him, while Abramowitz, after honorable separation from active duty, was subsequently given an Undesirable Discharge from the Enlisted Reserve; second, the character of Harmon's discharge was predicated in part upon in-service conduct and in part upon pre-induction activity, while the character of Abramowitz's discharge was predicated entirely upon pre-induction activity. The cases are calendared for consecutive presentation to the Court. Due to the similarity of most of the basic issues, we are presenting our arguments in both cases in this single brief. The facts in the two cases are as follows:

1. *No. 80.* Petitioner Harmon was inducted into the Army on October 31, 1952, under the Universal Military Training and Service Act, 50 U. S. C. App. 451, *et seq.* (H. R. 2–3). On May 7, 1953, he was interrogated by military authorities concerning membership in, association with, or activity on behalf of the Communist Party and persons or organizations connected therewith, and his willingness to bear arms against Communist-dominated and influenced nations. Harmon answered some of the questions and as to others invoked his privilege against self-incrimination (H. R. 91–98).

On February 9, 1954, the Adjutant General ordered Harmon to explain in writing certain information relevant to his security status which had been received by the Army. This information concerned reports that Harmon had been employed in 1951 and

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1952 by organizations which were reported to be subversive or Communist-operated; that he had registered in New York in 1952 with the American Labor Party, cited by the House Un-American Activities Committee as being under Communist control in New York City; that he had solicited contributions for the defense of persons under indictment for violations of the Smith Act; that he had associated with Communists or Communist sympathizers; that his father was a member of the Communist Party and a member of or active in other organizations cited as subversive or Communist by the Attorney General, and had registered with the American Labor Party; and that his stepmother had registered with the American Labor Party (H. R. 3–4).

On March 11, 1954, Harmon replied with respect to this information. He acknowledged that he worked in 1951 and 1952 at Camp Lakeland, which was reported to be a Communist-operated camp, but asserted it was labelled as Communist-dominated by persons opposed to inter-racial relations. He also acknowledged employment in 1949 by the Detroit Urban League, reportedly a subversive organization, but asserted that he took the job because he needed summer employment and that he did not know the League as a subversive organization. Harmon did not explicitly acknowledge that in 1952 he registered to vote with the American Labor Party in New York, but asserted that it was a lawful political organization and that he had the right to vote for the party of his choice. He stated that he had solicited funds

for the defense of persons under indictment for violation of the Smith Act, but asserted he had a constitutional right to do so.[5] He refused to reply to the allegations concerning his father and stepmother on the ground that such questions were irrelevant since his father and stepmother were not employed by the Federal Government. Harmon also asserted that he had never been a member of the Communist Party, but that it was possible that, as a public speaker, he had been acquainted with Communists or Communist sympathizers (H. R. 4–6).

On April 2, 1954, Harmon was informed that the Army would not discharge him as "disloyal or subversive," but that he would be assigned to nonsensitive duties in the lowest pay grade, and that, upon completion of his term of service, he would be given a type of discharge appropriate to the character of the service he had rendered (H. R. 6–7). This determination was based upon the provisions of Army Regulation 615–370 providing for the retention in the Army of persons found to be security risks but not disloyal or subversive (H. R. 29).

On April 7, 1954, the Secretary of Defense issued Department of Defense Directive 5210.9 (H. R. 33–45). The purpose of the directive was to effect the modification of outstanding regulations of the armed services so as to apply to military personnel the criteria of the security program established for the Government's civilian employees by Executive Order

[5] The record shows that these solicitations took place several weeks after Harmon was inducted into the Army (H. R. 7–8).

10450 (April 27, 1953, 18 F. R. 2489) (H. R. 34). The directive prescribed that "[t]he standard for * * * retention within the Armed Services shall be that on all the available information it is determined that * * * retention is clearly consistent with the interests of national security" (H. R. 36). The directive was accompanied by a Memorandum from the Secretary of Defense directing that cases previously cleared be reviewed under the new standard (H. R. 32–33).

The Army thereupon reviewed Harmon's case and determined that his retention in the service was inconsistent with the interests of national security and that he should be discharged with an Undesirable Discharge (H. R. 30–31). On June 2, 1954, he was so discharged (H. R. 13, 14). His discharge certificate contained no notation of the authority under which he was discharged (H. R. 13); the standard-form Report of Separation from the Armed Forces erroneously cited Army Regulation 615–370 instead of Directive 5210.9 as the authority for his discharge (H. R. 14, 98–99).

At the time of his separation, Harmon's service record was marked "excellent" as to character and efficiency for the periods of November 14, 1952, to July 28, 1953, and August 2, 1953 to April 24, 1954; it was marked "unknown" for the balance of his military service (H. R. 9, 114–115).

Immediately after his discharge, Harmon applied to the Army Discharge Review Board to have the character of his discharge changed from Undesirable to Honorable (H. R. 10). On October 22, 1954, he

appeared with counsel at a formal hearing before the Board at which he had the right to present evidence in his behalf, testify in person, or submit a written statement or brief (H. R. 63). Harmon testified as the sole witness, giving in an expanded form essentially the same answers he had given The Adjutant General in writing before his discharge, and explaining his reasons for refusing to answer certain questions during his interrogation on May 7, 1953 (H. R. 63–90). The Army Discharge Review Board ruled against changing the character of Harmon's discharge (H. R. 10). He then applied to the Army Board for the Correction of Military Records for the same relief, but that Board also denied his application (*ibid.*).

Harmon then made a direct request to the Secretary of the Army for the award of an Honorable Discharge (*ibid.*). The request was reviewed by an Assistant Secretary of the Army as the delegate of the respondent. On July 5, 1955, he referred it to the Army Board for the Correction of Military Records (H. R. 45). By letter of July 7, 1955, Harmon's counsel stated that he had no additional evidence to present (H. R. 52–53). The Assistant Secretary of the Army replied that the Board for the Correction of Military Records would consider all material evidence of record and inquired of counsel whether he intended to appear at the hearing scheduled for July 27, 1955 (H. R. 54). Counsel for Harmon wrote that he would not appear at the hearing because he had no additional material to offer (H. R. 55–56). The Army Board for the Correction for Military Records then considered Har-

mon's request on the whole record before it, and recommended to the Assistant Secretary that his discharge certificate not be changed. On November 10, 1955, after reviewing the matter under the standard of Department of Defense Directive 5210.9, the Assistant Secretary approved the Board's recommendation (H. R. 45–46, 56–57).

Subsequent to Harmon's direct request to the Secretary of the Army, but prior to its final determination, the instant action was commenced in the District Court (H. R. 2). After filing of the complaint and answer, the present Secretary of the Army was substituted for his predecessor in office (H. R. 27, 106). Both sides filed motions for summary judgment with supporting affidavits (H. R. 17–26, 28–51). The District Court held that it had no jurisdiction to review, control or compel the granting of military discharge certificates (H. R. 99–104) and it therefore denied Harmon's motion for summary judgment, granted respondent's motion, and dismissed the complaint (H. R. 105).

Harmon appealed from this judgment and, while his appeal was pending, he was notified by The Adjutant General on June 6, 1956, that the character of his discharge was changed from "Undesirable" to "General (Under Honorable Conditions)" (H. R. 110). This change was effected as the result of a review conducted by the Army Discharge Review Board of all military personnel security cases which were closed between November 10, 1948, and November 16, 1955. As a result of this review, Harmon's separation records have been changed to show a dis-

charge under honorable conditions, and a new discharge certificate and report of separation, retroactively reflecting a discharge under honorable conditions, have been issued (H. R. 111–112).

The Court of Appeals, by order of August 17, 1956, denied the respondent's suggestion that this change in the character of Harmon's discharge rendered the case moot (H. R. 115). Subsequently, the court, in an opinion by Judge Prettyman, affirmed the judgment of the District Court, holding that the action of the respondent did not infringe any of Harmon's statutory or constitutional rights, and that, in the absence of such infringement, the court did not have authority to review the exercise by the Secretary of the Army of his discretion to determine what type of discharge a soldier should be given (H. R. 116–129). Judge Bazelon dissented (H. R. 129–138).

2. *No. 141.* Petitioner Abramowitz was inducted into the Army on October 15, 1951, under the Universal Military Training and Service Act (A. R. 2, 10). On June 30, 1953, he was released from active duty with a certificate of honorable separation, and transferred to inactive service in the Enlisted Reserve (A. R. 2–3). Abramowitz thereafter applied for and was granted certain veterans' benefits administered by the Veterans Administration (Appendix B, *infra*, pp. 82–88).*

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*The letter from the General Counsel of the Veterans Administration, cited in the text and printed in the Appendix, was attached to the Defendant's Motion for Summary Judgment (A. R. 16) as Exhibit 1 and was a part of the original record both in the court below and in this Court. It was,

On July 15, 1955, The Adjutant General of the Army informed Abramowitz by letter that the Army had received the following information which furnished reason to believe that his retention in the Army Establishment might not be clearly consistent with the interests of national security: that he had been a member of the Communist Party during 1948 and 1949; that he had been a member of the American Youth for Democracy from 1946 to 1948 and of the Labor Youth League from 1949 to 1951, both organizations cited by the Attorney General as subversive, Communist, or Communist-front; and that during 1950 he had been a subscriber to the "Worker", the Sunday edition of the Communist "Daily Worker". The letter advised Abramowitz that he could elect one or more of the following courses: within 5 days of receipt, request a hearing with counsel and opportunity to present witnesses before a Field Board; within 15 days, rebut the letter in writing with documentary support; or, within 5 days, elect to be discharged from the Enlisted Reserve. It was further stated that failure to request the Field Board hearing might result in action to effect his discharge under the then-current security regulation, S. R. 600–220–1, a copy of which, together with a Summary of Information concerning the allegations, was enclosed with the letter.[1]

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however, inadvertently omitted from the Joint Appendix as printed for the Court of Appeals and also in the designations of the record for printing in this Court.

[1] As Abramowitz notes, S. R. 600–220–1 was superseded by AR 604–10 (A. Br. 37–50) on July 29, 1955, but for present purposes the two regulations are identical (A. Br. 5). The regula-

On August 22, 1955, more than 5 weeks later, Abramowitz replied to this letter. He declined the proffered hearing, electing instead to confine himself to a written response. He did not deny any of the allegations set forth in The Adjutant General's letter, but protested that the allegations did not constitute lawful grounds for his discharge and had no bearing upon his right to retain his status as a member of the Enlisted Reserve (A. R. 8–10).

The Army Security Review Board, a board of officers within the Department of the Army, considered Abramowitz's case under the provisions of Army Reg. 604–10, the security regulation then in force, and recommended that he be discharged with an Undesirable Discharge (A. R. 17). The Secretary of the Army approved this recommendation (A. R. 17), and on September 13, 1955, Abramowitz was discharged from the Enlisted Reserve (A. R. 10). The Undesirable Discharge certificate furnished him noted that "AR 604–10 applies" (A. R. 10).

Abramowitz thereafter applied to the Army Discharge Review Board requesting a change in the type of his discharge (A. R. 3). This request was denied on May 9, 1956 (A. R. 11), and on May 21, 1956 Abramowitz filed his complaint in the District Court (A. R. 2–11). Two days later he filed an application

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tion provided that the character of discharges issued to persons discharged on security grounds should "be predicated upon the gravity of the reasonably substantiated information in derogation" (A. Br. App. 44, § 19 (a)), but that it should be "no higher than 'General, under Honorable Conditions'" (A. Br. App. 38–39, § 3 (b)).

for review with the Army Board for Correction of Military Records, which was denied on September 7, 1956 (A. R. 19–21).

Meanwhile, Abramowitz had moved for summary judgment in the present action (A. R. 12–14) and the respondent had answered (A. R. 15–16) and filed a cross-motion for summary judgment (A. R. 16–20). As in Harmon's case, the District Court held that it had no authority to review, control or compel the granting of particular types of military discharge certificates, and accordingly denied Abramowitz's motion for summary judgment, granted respondent's motion, and dismissed the complaint (A. R. 22). On appeal, the Court of Appeals ruled that its decision in *Harmon* was controlling and affirmed in a *per curiam* opinion (A. R. 23).

SUMMARY OF ARGUMENT

I

A. Congress throughout our history has left the form and character of administratively-issued military discharges to the discretion of the Executive Branch of the Government. It has never given evidence that the exercise of this discretion is amenable to judicial scrutiny and control. Acting under its broad constitutional authority "To make Rules for the Government and Regulation of the land and naval Forces" (Art. 1, Section 8, Cl. 14), Congress has required the Army to issue certificates of discharge and has provided that "No enlisted person * * * shall be [administratively] discharged * * * except in the manner prescribed by the Secretary of the Depart-

ment of the Army * * *". No statutory limitations have been imposed upon the discretion of the Secretary to promulgate regulations establishing categories of discharges for administrative issuance and to apply those regulations to individual cases, other than to require, in certain cases, findings by a board of officers before a member of the Enlisted Reserve may be involuntarily discharged for cause under less than honorable conditions—a statutory requirement complied with here. This general absence of congressional limitations, either substantive or procedural, upon executive discretion is coupled with congressional recognition of the regulations of the Army prescribing various types of administrative, non-punitive discharges, some issued under honorable conditions and others under other than honorable conditions. Congress has also recognized that the Army issues Undesirable Discharges in some cases of dismissal on security grounds.

Never has Congress overruled these regulations and practices by substituting a detailed statutory scheme of discharges for the long-standing regulatory scheme. Nor has it provided for judicial review. Instead, Congress has reserved to itself the function of correcting abuses or mistakes in the exercise of the administrative discretion. For at least seventy years, Congress granted such relief by passing numerous private bills altering the character of military discharges, a practice demonstrating that Congress never intended the courts to have identical authority to review and grant relief in such cases. When Congress gave up this time-consuming function in the Legis-

lative Reorganization Act of 1946, it transferred its powers not to the courts but to administrative boards, subject to the approval of the Secretary. Congress prohibited the introduction of private bills to correct military records and authorized the establishment of the Army Board for the Correction of Military Records. At the same time, Congress prohibited the introduction of private bills for the relief of persons injured by the negligence of Government employees, but provided *both* an administrative and a judicial remedy in such cases (Legislative Reorganization Act of 1946, 60 Stat. 812, *et seq.*). Congress clearly did not authorize by mere implication a similar judicial remedy for the correction of military records, including discharges, particularly when to have done so would have imposed a staggering burden upon the courts of the District of Columbia.

B. The judicial decisions in this area bear out our contention that the actions here in question are not subject to judicial review. This Court and the lower courts have consistently recognized that "judges are not given the task of running the Army." *Orloff* v. *Willoughby*, 345 U. S. 83, 93. Considerations involving the separation of powers and the requirements of military morale and discipline have caused the Court to stay its hand where the military has acted in matters committed to its authority, and to refuse to apply to the military the standards which govern judicial review of administrative action in civilian fields. Since the Army had jurisdiction of the petitioners, jurisdiction to determine whether their retention in the Army was clearly consistent with the in-

terests of national security, and jurisdiction to issue them administrative discharges, there is no basis for review of the actions of the respondent in these cases.

II

In any event, the discharges issued to petitioners do not invade any legally protected rights of petitioners and therefore furnish no basis for claims upon which relief may be granted. Petitioners' speculative contentions as to possible future adversities, arising from the potential loss of state veterans' benefits and from apprehension of lowered community esteem, are not injuries of the kind which give rise to federal jurisdiction. Both petitioners are fully eligible for federal veterans' benefits, and there is no showing that state benefits, which are gratuities at best, will not be similarly awarded them. Nor is the speculative stigma of a General Discharge (under honorable conditions) or an Undesirable Discharge a legally remediable injury, since no legal disabilities have attached as a result of these discharges.

The notation "AR 604–10 applies" on Abramowitz's discharge, indicative of a determination that his retention in the Army was not clearly consistent with the interests of national security, similarly gives rise to no legal injury. Petitioners do not contest the Army's right to make this determination. Their claims to unlawful and actionable government defamation therefore rest upon admittedly valid determinations made by government officials concededly acting within the scope of their authority. Such official action cannot, however, serve as the basis for a cause of action in

defamation. *Spalding* v. *Vilas*, 161 U. S. 483. Moreover, the determination here made is not inherently defamatory, even if it were to be assumed that a determination that petitioners were "Communists" or "subversives" would be.

Petitioners have suffered no "punishment" in the legal or constitutional sense. Both Congress and the courts have recognized that administrative discharges are not "punishment." Such First Amendment rights as petitioners may have had to engage in the pre-induction activities here involved have therefore not been infringed, nor is the Army guilty of violating the prohibitions against bills of attainder and *ex post facto* laws. Since administrative discharge proceedings are not criminal trials, the Sixth Amendment has no application.

ARGUMENT

INTRODUCTION

Petitioners ask this Court to nullify the less-than-honorable discharges issued to them by the Army and to compel the issuance of Honorable Discharges. They assert that the pertinent Department of Defense directive and Army Regulation, as applied to them, violate their rights to procedural and substantive due process and trial by jury guaranteed by the Fifth and Sixth Amendments, their rights to free speech and assembly guaranteed by the First Amendment, and the proscriptions against bills of attainder and *ex post facto* laws contained in Article I, Section 9 of the Constitution.

In view of this broad range of constitutional issues sought to be raised, it is necessary at the outset to

give some more precise definition to the issues actually presented for adjudication, not only as we see them but as they have been circumscribed by petitioners themselves.

1. In our view, these cases present two dispositive jurisdictional issues: whether military discharges are subject to judicial review at all; and if they are, whether the issuance of military discharges, designated in one case "General Discharge (Under Honorable Conditions)", with no notations, and in the other case "Undesirable Discharge", with the notation "AR 604–10 applies", gives rise in these cases to legal injuries cognizable in the courts. We answer both questions in the negative, in Points I and II, *infra*, and submit that these answers are fully dispositive of these cases. It is our initial contention that Congress, which, with the President, has plenary authority over the Armed Forces, has never given the courts jurisdiction to review or control the administrative issuance of military discharges, but has, instead, vested broad discretion in the heads of the service departments to establish categories and conditions of discharges, and has reserved to itself, or its delegates, the function of correcting any abuses or mistakes. Our second contention is that, questions of *in limine* jurisdiction aside, these particular cases present no justiciable controversies because the discharges here have given rise to no legal injuries.

2. Petitioners appear to agree that the critical jurisdictional issues are as we have stated. They would answer both jurisdictional questions in the affirmative, by attempting to derive a constitutional and statutory basis for judicial review of any less-than-

honorable discharge and of any notation which might reveal that security considerations were the cause for discharge. Their fundamental argument is that there is a constitutionally protected "right" to an Honorable Discharge requiring procedural and substantive due process in issuing any other types of discharge; an ancillary claim is that the dischargee's activities in constitutionally protected areas may not lawfully provide grounds for the issuance of a less-than-honorable discharge, at least in the absence of their overt adverse effects upon military service.

Petitioners would not limit judicial review to the enforcement of proper procedures in discharging; they would require review of the basis for the discharge. Here, they ask the Court to nullify their discharges because—procedural questions aside—they are grounded (at least in part) upon the consideration of preinduction activities. Indeed, petitioner Harmon contends that, if a less-than-honorable discharge carries with it a notation indicating that it is given because the dischargee's retention is deemed not clearly consistent with the interests of national security, its issuance is not merely subject to judicial review but may not be accomplished "without providing * * * all the safeguards of a judicial trial, or in the alternative, the safeguards of a General Court-Martial under the Uniform Code of Military Justice" (H. Br. 41).

3. What petitioners do *not* contend is equally important. They do *not* urge that any of the following actions, in and of themselves, invade their legally-protected rights:—the underlying determinations that

their continued retention in the Army was not clearly consistent with the interests of national security; the procedures adopted or the information relied upon in reaching those determinations; or their resulting dismissals. They concede that the "Army has an absolute right to discharge any member of the Armed Forces for any reason which, in its unrestricted judgment, seems to be necessary for its best interests".[1] Petitioners' concern with constitutional issues, "loyalty", "security", and analogous questions, is thus limited to the extent to which these matters may be reflected in a military discharge certificate and accompanying documents.

This delineation of the issues by petitioners has special significance in placing the present cases in their proper perspective in the series of cases which have come before this Court involving the loyalty and security programs of the Executive Branch of the Government. The past cases have arisen under Executive Order 9835 (12 F. R. 1935), the original order establishing a loyalty program for federal employees, and Executive Order 10450 (18 F. R. 2489), revoking and superseding Executive Order 9835 and establishing an employee program based on considerations of security rather than loyalty. While Defense Directive 5210.9 and Army Reg. 604–10, under which petitioners were discharged, contain essentially the same provisions as Executive Order 10450, modified to meet the needs of the military, the issues here are quite different from those previously raised.

[1] (A. Br. 25; see also H. Br. 15, 16, 25, 31, 40, 46, 47, especially p. 31.)

Unlike the contentions made in those earlier cases, petitioners' claims do not relate to civilian government *employment* but to military *discharge* certificates; they are not based upon loyalty determinations but upon notations indicative of determinations that petitioners' retention in the Army was not clearly consistent with the interests of national security—determinations which petitioners concede the Army was authorized to make with no procedures whatsoever, so long as an Honorable Discharge followed. Petitioners, in short, are concerned not at all with their retention in the military service, but solely with the character of the discharges granted them.

I

THE FORM AND CHARACTER OF DISCHARGES FROM THE MILITARY SERVICE IS A MATTER OF EXECUTIVE DISCRETION AND IS NOT SUBJECT TO JUDICIAL REVIEW

A. CONGRESS HAS TRADITIONALLY LEFT THE ESTABLISHMENT OF TYPES AND CONDITIONS OF MILITARY DISCHARGES TO THE EXECUTIVE BRANCH, AND THE ARMY HAS TRADITIONALLY PROVIDED DIFFERENT TYPES OF DISCHARGES

The Constitution divides authority over the military establishment between the President, who is designated "Commander in Chief of the Army and Navy",[9] and the Congress, which is given specific authority "To raise and support Armies"[10] and "To make Rules for the Government and Regulation of the land and naval Forces".[11] See, generally, Rossiter, *The*

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[9] Art. II, Sec. 2, Cl. 1.
[10] Art. I, Sec. 8, Cl. 12.
[11] Art. I, Sec. 8, Cl. 14.

Supreme Court and the Commander in Chief (1951). In the exercise of this latter power, Congress has established the Department of the Army and, as the court below noted, has "clearly express[ed] a Congressional intent that the Army be administered solely by the executive branch of the Government".[12]

In providing for the separation of soldiers from the Army, Congress has made express provision for discharges ever since the founding of the Republic. It has never, however, exercised this power to the extent of specifying particular types or conditions of discharges. These matters have been left to the discretion of the Army itself. Cf. *Patterson* v. *Lamb*, 329 U. S. 539, 542; *United States* v. *Kingsley*, 138 U. S. 87; *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C.), certiorari denied, 342 U. S. 943; *Davis* v. *Woodring*, 111 F. 2d 523 (C. A. D. C.); *Palmer* v. *United States*, 72 C. Cls. 401; *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529.

1. *The statutes.* The basic statute relating to the discharge of enlisted personnel vests plenary discretion over discharges in the Secretary of the Army. At the time the present actions were commenced, it read as follows (Act of June 4, 1920, Chap. II, Art. 108, 41 Stat. 759, 809, as amended, formerly 10 U. S. C. 652a; emphasis added):[13]

> No enlisted person, lawfully inducted into the military service of the United States, shall

[12] H. R. 120, citing 10 U. S. C. (Supp. IV) 3012.

[13] This provision was rephrased in the recodification of Title 10 (Sec. 3811).

> be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, *except in the manner prescribed by the Secretary of the Department of the Army,* or by sentence of a general or special court-martial.

This statute finds its origin in the British Articles of War in force at the outbreak of the American Revolution.[14] The substance of the provision has remained unchanged since the enactment of the Articles of War of 1806 (Act of April 10, 1806, Art. 11, 2 Stat. 359).[15]

Other existing statutes refer to the discharge of particular categories of soldiers, but again they do not attempt to control the discretion of the Secretary of the Army or the Secretary of Defense. The Universal Military Training and Service Act provides (Sec. 4 (b), 50 U. S. C. App. 454 (b); emphasis added):

> Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or

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[14] Sec. III, Art. II; reprinted in Winthrop, *Military Law and Precedents* 931, 933 (1920 ed.). See also American Articles of War of 1775 passed by the Continental Congress on June 30, 1775, Art. I, 1 Journals of the American Congress, pp. 90, 94–96, reprinted in Winthrop, pp. 953, 956–958; American Articles of War of 1776, Sec. III, Art. 2, 1 Journals of the American Congress, pp. 482, 483, reprinted in Winthrop, pp. 961, 962; American Articles, enacted May 31, 1786, Art. 13, 4 Journals of the American Congress, pp. 649, 650, reprinted in Winthrop, pp. 972, 973.

[15] See Title XIV, Rev. Stat. (2d ed., 1878), Sec. 1342, Art. 4, p. 230.

discharged *in accordance with procedures prescribed by the Secretary of Defense* (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section].

The Armed Forces Reserve Act of 1952 provided [16] (50 U. S. C. 991, 992; emphasis added):

SEC. 248. Subject to the provisions of this Act, the discharge of commissioned officers of the reserve components shall be effected at the pleasure of the President, and the discharge of other members of the reserve components shall be *in accordance with regulations promulgated by the appropriate Secretary.*

SEC. 249. (a) * * *

(b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

(c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) of this section shall be given a discharge under honorable conditions unless—

(1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved

[16] These provisions, in modified form, are now codified in 10 U. S. C. (Supp. IV) 1162, 1163.

findings of a board of officers convened by competent authority, or

(2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings.

See also 10 U. S. C. (Supp. IV) 3812, 3813 and 3816.

Although the statutes do not prescribe the various types or conditions of discharges, Congress has frequently recognized, with implicit approval, the fact that different types of discharges are given—some punitive, pursuant to courts-martial sentences, and others by administrative issuance.[17] Congress has expressly recognized the two types of discharge—Bad-Conduct and Dishonorable—reserved exclusively for punishment, and has exercised limited control over their issuance by defining the powers of courts-martial to prescribe such discharges.[18] There has been no such explicit statutory reference to the names of the various types of discharges authorized for administrative issuance by Army Regulations.[19] Nevertheless, Congress has recognized the general category of "administrative discharge"[20] and also the practice

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[17] See Davis, *A Treatise on the Military Law of the United States*, 357 (3d ed., 1913).

[18] Uniform Code of Military Justice (64 Stat. 108, *et seq.*, 10 U. S. C. (Supp. IV) 801, *et seq.*), Arts. 18–20, 10 U. S. C. (Supp. IV) 818–820. See also Arts. 65, 66, 71–76, 10 U. S. C. (Supp. IV) 865, 866, 871–876; and 10 U. S. C. (Supp. IV) 3636.

[19] A statute relating to the settlement of a soldier's indebtedness to the United States upon discharge does, however, refer to "an enlisted member's * * * honorable discharge" (10 U. S. C. (Supp. IV) 4837 (d)).

[20] The Article of the Uniform Code dealing with the remission or suspension of court-martial sentences provides that "[t]he Secretary concerned may, for good cause, substitute *an*

of issuing differing types of administrative discharges under differing conditions, which may be either honorable or other than honorable.[21] This congressional awareness is evident in the statutory authority given the Army Discharge Review Board "to review * * * the *type and nature* of [a] discharge or dismissal, *except* a discharge or dismissal by reason of the sen-

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administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial" (Art. 74 (b), 10 U. S. C. (Supp. IV) 874 (b); emphasis added). Article 75 (10 U. S. C. (Supp. IV) 875) states that if a court-martial sentence is set aside or disapproved on review, all rights affected by an executed part of the sentence, "except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered * * *"; if a new trial is ordered and "a previously executed sentence of dishonorable or bad-conduct discharge is not imposed * * *, the Secretary concerned shall substitute therefor *a form of discharge authorized for administrative issuance* unless the accused is to serve out the remainder of his enlistment" (emphasis added). Section 12 of the Act of May 5, 1950, 64 Stat. 147, 50 U. S. C. 740, authorizes the Judge Advocate General, in certain circumstances, to make a similar substitution of "a form of discharge authorized for administrative issuance" for "a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed * * *".

[21] A partial list of phrases used by Congress in referring to the character of a soldier's separation from the military is as follows: "served honorably": 38 U. S. C. 706b, 8 U. S. C. 1440 (a); "service terminated honorably": 24 U. S. C. 279a and 281; "honorably discharged": 53 Stat. 999, 28 U. S. C. 755, 43 U. S. C. 238, 279 and 331; "discharged [or separated] under honorable conditions": 5 U. S. C. 645d and 851; 8 U. S. C. 1440, 37 U. S. C. 32, 38 U. S. C. 691a and 1011 (a); "discharged honorably or under honorable conditions": 10 U. S. C. (Supp. IV) 772 (d); "discharged under conditions other than dishonorable": 7 U. S. C. 1001 (b) (2), 38 U. S. C. 694 (a), 695f, 696 (a), 911 (2) (B), and 997, 42 U. S. C. 417 (d) (2) and 1477, 70 Stat. 869, Sec. 303 (e); "dishonorably discharged": 8 U. S. C. 1481 (a) (8), 38 U. S. C. 706.

tence of a general court-martial * * * [and] to change, correct, or modify any [such] discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board" (58 Stat. 286, as amended, 38 U. S. C. 693h, emphasis added).

Congressional recognition of the differing types of administrative discharge is further evident in the Armed Forces Reserve Act of 1952, the one statute establishing statutory procedural (but not substantive) requirements for the issuance of administrative discharges. Section 249 (c) of that Act, quoted *supra*, at pp. 25–26, provides in substance that an administrative discharge from the reserves for cause, under other than honorable conditions, can be issued to a reservist only after board proceedings (such as were held in Abramowitz's case (A. R. 17)) or the waiver of such proceedings.

The legislative history of this provision of the Armed Forces Reserve Act of 1952 shows specifically that Congress recognized and acquiesced in the administrative issuance of less-than-honorable discharges in security cases. The provisions of what was enacted as Section 249 were originally found in Section 250 of H. R. 4667 and its successors, H. R. 4860 and H. R. 5426. The provisions of subsection (c) in these bills were essentially the same as those finally enacted (*supra*, pp. 25–26), including subparts (1) and (2), except that they contained a third subpart:

> (c) A member of a reserve component discharged for cause other than as specified in subsection (b) of this section shall be given a

discharge under honorable conditions unless—

(1) * * *

(2) * * *

(3) *The appropriate Secretary determines that a hearing is not in the best interests of the Government for security reasons.* [Emphasis added.]

The House Committee report explained this provision as follows (H. Rep. No. 1066, 82nd Cong., 1st sess. (1951), p. 49; emphasis added):

SECTION 250. *Limitations on discharges*

(a) * * *

(b) * * *

(c) *Character of discharge.*—This subsection requires a member of the reserve components discharged for cause to be given a discharge under honorable conditions unless dropped from the rolls under subsection (*b*), discharged pursuant to sentence of court martial or pursuant to findings of a board of officers, *discharged for security reasons,* or discharged after waiver of court-martial or board proceedings.

In other words, the bill would have authorized the administrative issuance to reservists, on security grounds, of discharges under other than honorable conditions (*i. e.,* Undesirable Discharges) without a hearing. On the day the measure was reported to the House, this third subpart was deleted, thereby subjecting security cases to the requirement of board proceedings before the issuance of an Undesirable Discharge (97 Cong. Rec. 13152, 13162).

This legislative history shows more than mere congressional approval of the issuance of undesirable dis-

charges in security cases; it demonstrates that Congress has been aware of the problems involved in discharging security risks and that it could have resolved all of the problems itself by appropriate legislation if it so desired. The numerous congressional materials cited by petitioners further demonstrate this fact (H. Br. 24, 35, 38, 45; A. Br. 18, 26, 31, 35). But the only "[p]rotections against arbitrary discharge" which Congress chose to enact in this field are those found in Sections 248 and 249 of the Armed Services Reserve Act of 1952 (see H. Rep. No. 1066, 82nd Cong., 1st sess. (1951), p. 39). These protections apply to Abramowitz, who was discharged from the reserve, and have been complied with (A. R. 17).

2. *The regulations.* The regulations implementing the statutes are issued under the broad authority of the Secretary of the Army, acting on behalf of the President as Commander-in-Chief.[22] They prescribe three types of discharge for administrative issuance: Honorable, General, and Undesirable.[23] The Unde-

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[22] Congress conferred express authority for the issuance of regulations for the government of the Army by the Act of March 1, 1875, 18 Stat. 337, 10 U. S. C. (Supp. IV) 3061, though doubtless the President always had such power by virtue of being the Commander-in-Chief. *United States* v. *Eliason*, 16 Pet. 291, 301; *United States* v. *Freeman*, 3 How. 556, 567; *Gratiot* v. *United States*, 4 How. 80, 117–118; *Kurtz* v. *Moffitt*, 115 U. S. 487, 503; see Lieber, *Remarks on the Army Regulations* (1898), 48–49, 72–73, 151–184. See also 10 U. S. C. (Supp. IV) 121; Act of July 26, 1947, Sec. 202, 61 Stat. 500, as amended, 5 U. S. C. 171a (b); Act of August 7, 1789, 1 Stat. 49, as amended, 10 U. S. C. 3012.

[23] A form of Honorable Discharge certificate has been issued for "honest and faithful service" at least since 1821. General Regulations for the Army, 1821, Para. 9, Art. 71, and Para. 12,

sirable Discharge and General Discharge were first provided for by name in 1947.[24] The 1953 Regulations, in effect at the time of petitioners' discharges,

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Art. 79. The Undesirable Discharge had its origin in the "discharge without honor" (see *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529), a type of discharge not officially provided for in the regulations until 1893 (Circular 15, Headquarters of the Army, 1893) but which had in fact been issued since the Civil War in circumstances where the discharge was neither honorable nor dishonorable. Howland, *Digest of Opinions of The Judge Advocates General of the Army*, (1912) 435, para. III A; see Davis, *A Treatise on the Military Law of the United States*, 357 (3d ed., 1913). The discharge without honor was replaced in the 1913 regulations by what was termed merely a "discharge," for use where the separation was based upon the soldier's ineptness, lack of adaptability or habits or traits of character rendering his "retention in the service * * * undesirable", or misconduct rendering him "disqualified for service, physically or in character". Regulations for the Army, Art. XXI, paras. 148½ and 150, dated November 15, 1913. See *Patterson* v. *Lamb*, 329 U. S. 539, 542, fn. 5. The prototype of the present-day General Discharge (under honorable conditions) was created in 1921 when provision was made for the issuance of an honorable discharge certificate, with the notation "reenlistment not warranted", when the soldier's conduct had been such as to render his retention desirable were it not for his inaptitude or lack of adaptability (*ibid.*, Change No. 117, July 1, 1921), *i. e.*, when he was unfit for retention through no fault of his own. Cf. *Bolger* v. *Marshall*, 193 F. 2d 37 (C. A. D. C.). At the same time, Paragraph 150 was amended to provide that the blank form for "honorable discharge" should not be used in cases where "the discharge is due to the commission of some crime or to some misconduct prior to entry into the service * * *", despite the fact that the conduct of the enlisted man had otherwise been such as to warrant reenlistment (*ibid.*). The only discharge authorized in such cases was "the discharge". Army Regulation 615–360 of December 6, 1922, substituted the "blue discharge" as the intermediate type for issuance in cases where the discharge was neither honorable nor dishonorable. See *In re Fong Chew Chung*, 149 F. 2d 904, 905–906, fn. 1 (C. A. 9).

[24] Circular No. 122, dated May 14, 1947.

prescribed five types of discharge certificates under the following scheme: [25]

Type of discharge	Character of discharge	Given by
Honorable	Honorable	Administrative action.
General	Under honorable conditions.	Administrative action.
Undesirable	Under conditions other than honorable.	Administrative action.
Bad conduct	Under conditions other than honorable.	Sentence of special or general court-martial.
Dishonorable	Dishonorable	Sentence of general court-martial.

Except as otherwise provided in the regulations, the Honorable Discharge certificate is prescribed for issuance in cases where the soldier's conduct ratings are at least "Very Good," his efficiency ratings at least "Excellent," and he has not been convicted by a general court-martial or more than once by a special court-martial.[26] The General Discharge is given to soldiers discharged under honorable conditions but who do not qualify for an Honorable Discharge.[27] It is prescribed for a soldier discharged for inaptitude or unsuitability for military service, whether through his own fault[28] or otherwise.[29] The regulations state that "[t]he effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefits." [30]

[25] Army Reg. 615–360, Sec. II, Para. 4, dated June 24, 1953.

[26] Army Reg. 615–360, Sec. III, Para. 8, dated June 24, 1953, as amended.

[27] *Ibid.*

[28] Army Reg. 615–368, Para. 5, dated October 27, 1948, as amended, since superseded by Army Reg. 635–208, dated May 21, 1956.

[29] Army Reg. 635–209, Paras. 2, 8, dated March 17, 1955.

[30] Army Reg. 615–360, Sec. III, Para. 7, dated June 24, 1953.

The Undesirable Discharge (under other than honorable conditions) is given in cases of such misconduct as fraudulent entry into the Army by concealment of citizenship status, of prior conviction, of prior desertion, or of prior discharge under other than honorable conditions; in cases where the soldier is charged with desertion or absence-without-leave and is physically unfit for service; and in cases of conviction by a civil court during term of service.[31] It is also given for undesirable habits and traits of charafter as manifested by chronic alcoholism, drug addiction, homosexuality, repeated venereal infections, repeated petty offenses, habitual shirking and psychopathic personality.[32]

At the time these actions were instituted, the regulations authorized the issuance of either the General or Undesirable discharge in cases processed under the military personnel security program where retention was found to be not clearly consistent with the interests of national security. The type of discharge certificate issued was to be "predicated upon the gravity of the reasonably substantiated information in derogation".[33]

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[31] Army Reg. 615–366, Para. 14, dated February 5, 1954, as amended, since superseded by Army Reg. 635–206, dated January 16, 1956.

[32] Army Reg. 615–368, Para. 5, dated October 27, 1948, as amended, since superseded by Army Reg. 635–208, dated May 21, 1956.

[33] Defense Directive 5210.9, Sec. VIII, Para. F (5) (H. R. 43); Army Reg. 604–10, Sec. 3, Para. 19 (a), dated July 29, 1955 (A. Br. App. 44). For the later evolution of these regulations, see *Schustack* v. *Herren*, 234 F. 2d 134, 136–138, fn. 4 (C. A. 2).

Petitioners do not contend that any of the foregoing regulations were violated in effecting their respective discharges. Instead, they ask this Court to read the pertinent statutes as precluding the issuance of the regulations authorizing petitioners' discharges in the manner in which they were accomplished;[33a] alternatively, they argue that, if the statutes may not be so read, the statutes themselves must be declared unconstitutional. Our position is that the statutes validly vest broad discretion in the Secretary of the Army to issue regulations such as those here questioned, and that the civil courts have no jurisdiction to review the manner in which the Secretary exercises this discretion, whether in establishing criteria for discharges or in applying those criteria in individual cases.

B. THE DISTRICT COURTS HAVE NO AUTHORITY TO REVIEW, CONTROL, OR COMPEL THE ACTION OF THE MILITARY IN PROVIDING FOR AND ISSUING ADMINISTRATIVE DISCHARGES

1. *Congress has never given the District Courts jurisdiction to review military discharges.* As we have

[33a] Petitioner Abramowitz further suggests (A. Br. 27, n. 14) that Army Reg. 604–10 is invalid because it has not been published in the Federal Register, citing Sections 2 and 3 of the Administrative Procedure Act, 5 U. S. C. 1001 and 1002. But Section 3, relating to publication, exempts from its requirements "any matter relating solely to the internal management of an agency"; Section 4, 5 U. S. C. 1003, requiring general notice of proposed rule making by publication in the Federal Register, exempts from its requirements "(1) any military, naval, or foreign affairs functions of the United States or (2) any matter relating to agency management or personnel * * *". Regulations pertaining to the security screening of military personnel obviously fall within both these exceptions.

seen, Congress throughout history has left all matters pertaining to the issuance of administrative discharges to the discretion of the military. Since the courts do not intervene in matters committed to executive discretion (*Wilbur* v. *United States*, 281 U. S. 206; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Gaines* v. *Thompson*, 7 Wall. 347), Congress has traditionally viewed itself as the sole tribunal competent to correct abuses of this discretion or mistakes in its exercise. Indeed, it has been long maintained that a discharge once issued, regardless of its character, was revocable only by Act of Congress, and that even the Executive—much less the judiciary—had no authority to void a discharge once issued, in the absence of fraud. Pasley, *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?*, 41 Cornell L. Q. 545, 578 (1956); Davis, *A Treatise on the Military Law of the United States*, 353–358 (3d ed., 1913). In the exercise of this exclusive review power, Congress has passed large numbers of private bills for the relief of persons who had received discharges other than honorable.[34] 40

[34] See, *e. g.*, the Act of April 13, 1876, c. 59, 19 Stat. 421, providing as follows:

> That the Secretary of War be, and he is hereby, directed to correct the record of the dismissal of Charles W. Mackey, first lieutenant Company C, Tenth Regiment Pennsylvania Reserve Volunteer Corps, and grant him an honorable discharge from the Army, to date July eleventh, eighteen hundred and sixty-three.

More recent examples (Acts of April 4, 1944, c. 171, 58 Stat. (pt. 2) 976, and of September 27, 1944, c. 434, 58 Stat. (pt. 2) 1022) are cited in 40 Op. A. G. 504, 505.

Op. A. G. 504, 505; *Goldstein* v. *Johnson*, 184 F. 2d 342, 343 (C. A. D. C.). This practice continued for many decades.

The notion that Congress would have expended considerable time and energy, over so long a period, in entertaining such bills if it conceived that it had already clothed the District Courts with identical jurisdiction is contrary to all concepts of the traditional function of the private bill as a means of redress where no other avenue of relief is available. And if Congress had never given the District Courts jurisdiction to review military discharges, those courts, having only such powers as Congress confers upon them, could not presume to exercise such jurisdiction. *Lockerty* v. *Phillips*, 319 U. S. 182, 187, and cases cited.

In 1946, Congress did away with its former practice of granting legislative review of military discharges by prohibiting the introduction in either House of private bills authorizing or directing the correction of a military or naval record (Legislative Reorganization Act of 1946, Sec. 131, 60 Stat. 812, 831). The purpose was to save congressional time.[11] Significantly, however, the former congressional prerogatives were not transferred to the courts; they were transferred to administrative bodies. Congress had already taken the first step in this direction in 1944 by authorizing the creation of administrative boards within each of the service departments to review administrative discharges (Servicemen's Re-

[11] S. Rep. 1400, 79th Cong., 2d sess., p. 7.

adjustment Act of 1944, Sec. 301, 58 Stat. 286, 38 U. S. C. 693h; App., *infra*, pp. 79–80), thereby providing for the relief of servicemen who considered themselves aggrieved, and at the same time doing away with the necessity for resort to Congress. 90 Cong. Rec. 4538; 40 Op. A. G. 504, 505. The pertinent debates in the House (90 Cong. Rec. 4538–4541), as well as the hearings on the 1944 bill (Hearings Before the House Committee on World War Veterans' Legislation on H. R. 3917 and S. 1767, 78th Cong., 2d sess., pp. 11–12, 40–41), bear out the view that Congress did not conceive of the courts as already having jurisdiction in this field. Nor is there the slightest evidence that Congress intended to create any new authority in the District Courts, and thus to subject the courts of the District of Columbia to an enormous flood of litigation in that field."[36] *Gentila* v. *Pace*, 193 F. 2d 924, 927 (C. A. D. C.), certiorari denied, 342 U. S. 943.

The finality clause of Section 301 of the 1944 Act, providing that the findings of the Discharge Review Boards are "to be final subject only to review by the Secretary of the Army * * *", is further evidence

[36] The following statistics indicate the enormous burden which would be assumed by the courts if they were to undertake direct review of the actions of the military in issuing less-than-honorable discharges, or review of the determinations of the Discharge Review Boards and Boards for the Correction of Military Records. Statistics for the Navy were not available for inclusion in the first two tables below.

(*1*) Total number of persons discharged annually from the Army and (from 1949 on) the Air Force, and the total of that number given less-than-honorable discharges (including Bad-Conduct and Dishonorable Discharges), from July 1, 1940 to June 30, 1957:

that Congress did not intend judicial review. *Gentila v. Pace, supra.* It is true, as petitioner Harmon points out (H. Br. 19–20), that a finality clause of this type does not by itself preclude judicial review of such administrative decisions as have been traditionally reviewable. But where judicial review has

Year	Number discharged	Number awarded less-than-honorable discharge
1940 (July through December)	46,459	3,216
1941	227,008	7,354
1942	265,267	5,476
1943	1,116,693	20,876
1944	636,551	28,009
1945	5,169,215	21,603
1946	3,763,975	16,145
1947	708,823	16,362
1948	564,564	13,934
1949	384,202	27,551
1950	386,563	26,211
1951	433,279	14,374
1952	840,910	22,021
1953	952,992	32,252
1954	848,080	39,632
1955	844,800	28,843
1956	674,768	32,847
1957 (January through June)	318,632	27,716

(*2*) Total number of less-than-honorable discharges issued by the Army and Air Force under military personnel security regulations from November 10, 1948 to August 31, 1957, in the case of the Army and October 1, 1957, in the case of the Air Force, and the number of such discharges upgraded as the result of post-discharge review by reviewing boards or by direct action of the service Secretary concerned:

General Discharges	594
Discharges under other than honorable conditions (Undesirable)	296
Number of above discharges upgraded after issuance	196

(*3*) Total number of cases disposed of by the Discharge Review Boards (Army, Navy, and Air Force), October 1944 through August 30, 1957—116,736.

(*4*) Total number of cases disposed of by the Boards for the Correction of Military or Naval Records (Army, Navy, and Air Force), June 1947 through August 30, 1957—41,850.

traditionally been absent, as here, and where a reversal of the tradition would increase the work-load of the courts by a substantial percentage, an increase which Congress did not contemplate, other considerations have been held to prevail.[36a] In such circumstances, the insertion of such a clause constitutes an additional indication of congressional intent that disputes concerning discharges are to reach their terminal point within the service departments and are not to be carried over into the courts. *Gentila* v. *Pace, supra,* at 927; cf. *Heikkila* v. *Barber,* 345 U. S. 229; *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 305; *Reaves* v. *Ainsworth,* 219 U. S. 296, 306.

The enactment of Sections 131 and 207 of the Legislative Reorganization Act of 1946 (60 Stat. 812, 831, 837) completed the transfer of congressional prerogatives relating to discharges to administrative boards. As we have noted (*supra,* p. 36), the first of these sections prohibited the introduction of private bills to correct military or naval records. Section 207 (5 U. S. C. 191a) authorized the Secretaries of the respective service departments to establish civilian boards for the correction of all such records, including, of course, military discharges. The Secretaries, acting through these independent administrative boards, were thus authorized to exercise the former congressional clemency powers and to make final and conclusive corrections of records. See 40 Op. A. G.

[36a] Compare *Heikkila* v. *Barber,* 345 U. S. 229 with *Shaughnessy* v. *Pedreiro,* 349 U. S. 48.

504, 508; 41 Op. A. G. No. 1, p. 2; 41 Op. A. G. No. 8, p. 4; 41 Op. A. G. No. 35.

Significantly for present purposes, Section 131, found in Title I of the 1946 Act, was not limited to prohibiting the introduction of private bills for the correction of military or naval records. The section listed three categories of private bills which were to be banned: bills "authorizing or directing (1) the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act, or for a pension (other than to carry out a provision of law or treaty stipulation); (2) the construction of a bridge across a navigable stream; or (3) the correction of a military or naval record * * *". We have seen that the Act channeled future claims relating to military records to the newly-established boards for correction of military records. An analogous administrative substitute for the private bill to authorize the construction of a bridge across a navigable stream was provided for in Title V, entitled the General Bridge Act (Section 501, 60 Stat. 847), which granted blanket congressional consent to the construction of such bridges, contingent upon the approval of the location and plans by the Chief of Engineers and the Secretary of War (Section 502, 33 U. S. C. 525). As for tort claims, Title IV of the Act, entitled the Federal Tort Claims Act (Sec. 401, 60 Stat. 842), similarly authorized administrative disposition of certain claims, giving the head of each federal agency authority to determine such claims not in excess of $1,000 (Sec. 403,

60 Stat. 843). But with respect to tort claims—*and only with respect to tort claims*—Congress provided a *judicial* remedy as well as an administrative remedy. It vested original jurisdiction in the District Courts to hear and determine claims against the Government based upon the negligence of its employees, as well as jurisdiction to redetermine claims previously submitted to a federal agency under Section 403 which had been finally disposed of by the agency or which had been withdrawn by the claimant.

These provisions of the Legislative Reorganization Act of 1946 seem to us to make two conclusions inescapable. The first is that applications for authority to build bridges over navigable streams, claims for damages arising from the negligence of government employees, and claims arising from entries in military records—including discharges—were alike considered by Congress as being at that time subject only to redress in Congress and not in the courts.[37] The

[37] Congress clearly did not believe that Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009), designed to affect only the scope of judicial review and not its availability (Senate Judiciary Committee Print, June 1945, Comment on Section 10 (e), Senate Document No. 248, 79th Cong., 2d sess., p. 39; cf. pp. 83–84, 229–230, 311, 415), had provided for judicial review of the decisions of the previously authorized Discharge Review Boards. The Legislative Reorganization Act was passed less than two months after the Administrative Procedure Act. Section 207 was not included in the bill when it passed the Senate on June 10, 1946, one day prior to the approval of the Administrative Procedure Act. It was inserted subsequently by the House Committee. The court below has previously held that the Administrative Procedure Act does not authorize judicial review of correction

second conclusion is that, in transferring its former exclusive prerogatives in considering claims sounding in tort both to agency heads and to the courts, while at the same time remitting matters relating to bridges and to military records exclusively to administrative bodies, Congress plainly bespoke its intention that the courts were to have authority in the first field but not in the second and third.[37a]

2. *The courts have recognized the limitations upon their authority in this field.* (*a*) This Court has never undertaken to invalidate discharges, such as those in these cases, which are issued under the broad discretion statutorily vested in the Secretary of the Army. In *Patterson* v. *Lamb*, 329 U. S. 539, 542, the Court expressly reserved the question of "[w]hether and to what extent the courts have power to review or control the War Department's action in fixing the type of dis-

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board decisions. *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C.), certiorari denied, 342 U. S. 943.

[37a] The Report of the Commission on Government Security (the Wright Commission), June 1957, while criticizing the policy of the Department of Defense in considering pre-induction activity in determining the character of certain discharges, nevertheless recognizes that this policy is subject to change only by the Department itself or by Congress, and not by the courts. The Commission has drafted a proposed bill to require that military discharges be based solely upon the character of military service (Report, pp. 719, 726). Two bills embodying this provision were introduced at the last session of Congress but have not yet been acted on. H. R. 8338 and H. R. 9352, 85th Cong., 1st sess. The Commission has further recommended that the Department of Defense review its discharge policy in the light of the Commission's recommendations, and has stated that if such review does not result in the recommended change, "Congress should consider providing legislation for judicial review in cases of other than honorable discharges in loyalty separations" (Report, pp. 147–148). (The

charge certificates issued to soldiers * * *".[*] Despite this reservation, the holding in that case is typical of this Court's rulings in cases involving discharge or retirement from the armed services:—where Congress has, as here, left matters to Executive discretion, the Court has not intervened to review or control the exercise of that discretion.

In *Lamb,* the plaintiff claimed that he was entitled to an Honorable Discharge rather than the "discharge from draft" given him when the World War I Armistice was signed shortly after his induction. This Court noted that the statute requiring that soldiers be given discharge certificates—the basic discharge statute here in question—"does not particularly prescribe the types or contents of certificates authorized to be granted. But pursuant to authority granted by Congress, the War Department" had promulgated regulations establishing general categories of discharges. 329 U. S. at 542. These, said the Court, were well suited to fit discharges in the normal course of Army routine. But when the special circumstances created by the Armistice made these categories inappropriate to the cir-

term "loyalty separations" is used because the Commission recommends reverting from the present "security" standard to a "loyalty" standard.) Two bills were introduced in the last session of Congress which would give the Court of Claims (not the District Courts) "jurisdiction to review any decision of any board for the correction of military records * * *", thereby affording the opportunity for judicial review of discharges qualifiedly recommended by the Commission. H. R. 6073 and S. 2036, 85th Cong., 1st sess. Again, no action has been taken on these bills.

[*] *Patterson* v. *Lamb* was decided in January 1947 before the effect of the Legislative Reorganization Act of 1946, with respect to military discharges, could be fully considered and appreciated. See *supra*, pp. 36 *ff*, *infra*, pp. 44, 45.

cumstances of the plaintiff's disharge, the Army had authority to make special provision for this class of cases. The Court ruled that the plaintiff's discharge "adequately indicates [the] facts. The law demands no more" (329 U. S. at 545).

The Court thus avoided the necessity of deciding whether it would have the authority to set aside a discharge, issued under the same statutory authority, if the facts indicated an abuse of discretion. In reserving this question, the Court made the following footnote reference to a series of cases holding that the courts will not review matters, including military discharges, entrusted to executive discretion (329 U. S. at 542): "See *Denby* v. *Berry*, 51 App. D. C. 335, 279 F. 317, 263 U. S. 29; *Davis* v. *Woodring*, 111 F. 2d 523; *Palmer* v. *United States*, 72 Ct. Cls. 401; *Wilbur* v. *United States*, 281 U. S. 206; cf. 58 Stat. 286, 38 U. S. C. Supp. IV, § 693h".

In *Denby* v. *Berry*, *supra*, the Court of Appeals had held that the plaintiff's discharge had been in violation of a detailed retirement statute and was therefore void. The Supreme Court reversed, holding that the plaintiff had merely been placed on inactive duty, a matter uncontrolled by statute (just as are administrative discharges) and therefore within the discretion of the Secretary of the Navy. *Davis* v. *Woodring*, *supra*, like *Lamb*, was a suit for an Honorable Discharge in lieu of a "discharge from draft". The Court of Appeals for the District of Columbia Circuit held that, despite the fact that the plaintiff "served under 'honorable conditions' and was discharged only because of physical unfitness, we

cannot because of these facts interfere with the internal management of the War Department or require it to issue discharge papers contrary to its established rules. Congress having failed to prescribe the form of discharge and having left it to the discretion of the President acting through the Secretary, we are wholly without any effective power to review. * * * That this must result in the denial of veteran hospitalization to petitioner is regrettable, but beyond our control". 111 F. 2d at 525.

Palmer v. *United States, supra,* was a suit for compensation based upon the alleged illegality of a discharge from the Coast Guard. The Court of Claims ruled that, despite the fact that the Coast Guard had violated its own rules in discharging the plaintiff, "the courts will not interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute". 72 C. Cls. at 406. The ruling was based upon the holding that the rules relating to discharges "pertained solely to administrative matters and not to any duties prescribed by law". *Id.* at 405. *Wilbur* v. *United States, supra,* related to the powers of the Secretary of the Interior in dealing with Indian affairs and held that the courts have no authority to control the exercise of executive discretion by writ of mandamus. The last citation in the footnote in *Lamb* is to the statute authorizing the creation in 1944 of the Army Discharge Review Board (see *supra,* pp. 36–39).

Other rulings by this Court in discharge and retirement cases reflect the same tenor as the foregoing

decisions. In *Reaves* v. *Ainsworth,* 219 U. S. 296, the Court considered the case of an officer who claimed that he had been discharged in violation of due process of law and of the applicable statute relating to the promotion, retirement, and discharge of officers. The Army Promotion Board had found him not qualified for promotion and he was discharged. The officer petitioned the Supreme Court of the District of Columbia (now the District Court) to review the Board's decision, contending that a prior decision of the Board had entitled him, under the statute, to retirement at three-quarters pay for life. In holding that the proceedings of the Board were not subject to review by the courts, this Court said (219 U. S. 304, 305, 306):

> * * * To those in the military and naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts. * * *
>
> It is contended, however, that the board of examination did not observe the procedure required by law * * *.
>
> * * * but no fixed procedure is provided by the statute * * * by very comprehensive words power is conferred upon the President to "prescribe a system of examination of all officers of the army * * *."
>
> * * * * *
>
> If it be disputable whether these provisions guarantee to an officer "the safeguards of a trial in court," it is certain that the decision is not

final with the board but must be reported with the proceedings to the President, and may be approved or disapproved by him. *This is the only relief from the errors or the injustice that may be done by the board which is provided. The courts have no power to review.* The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. And this was the motive of the act of October 1, 1890, and naturally its accomplishment was intrusted to the President. *He executed the trust by constituting examining boards, defining their duty and reserving to himself the ultimate review of their proceedings and decision. This is the protection which the act of Congress gives to the rights conferred by it.* If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined. [Emphasis added.]

A similar result was reached in both *United States ex rel. French* v. *Weeks*, 259 U. S. 326, and *United*

States ex rel. Creary v. *Weeks*, 259 U. S. 336." In both cases, the Court ruled that the President, through the Secretary of War, had exercised the discretion vested in him by the statute in question and that the court had no jurisdiction to issue the writ of mandamus prayed for. In *Creary*, the plaintiff, a Colonel, was discharged "due to his neglect, misconduct, and avoidable habits". 259 U. S. at 342. This Court declined to review further than to determine the scope of executive discretion to discharge officers conferred by the applicable statute and the jurisdiction of the examining boards over the person and subject matter. In finding both jurisdiction and broad discretion, the Court said (259 U. S. at 343, 344):

> * * * military tribunals are as necessary to secure subordination and discipline in the Army as courts are to maintain law and order in civil life; and the experience of our Government for now more than a century and a quarter, and of the English Government for a century more, proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs * * *. It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the classification and reduction in number of the officers of the Army * * *. In its nature it belongs to the executive and not to the judicial branch of the Government.
>
> In the present case it is admitted that the relator was given full opportunity to be heard

[39] See also *Rogers* v. *United States*, 270 U. S. 154.

> and that he was heard by * * * the only [tribunal] * * * which the act of Congress requires shall give him a hearing. The various boards * * * each certainly had jurisdictio. over the person of the relator as an army officer and over the subject of the inquiry, * * * and * * * the right dealt with was distinctly military in its nature, affecting the status in the Army of a soldier, and it is entirely clear that the boards * * * did not exceed the powers conferred upon them. Such being the case, the Supreme Court of the District was without power to review or in any manner control the conduct of the boards or the result of their action.

It is noteworthy that all of the cases we have just discussed related to actions by the military in terminating the complainant's military connection, and that consequently the complaints, just as those of the petitioners here, were (with the exception of *Palmer*) directed to the post-separation, civilian, effects of these actions rather than to their impact upon the continuing military careers of the complainants. In each case, the complainant had a substantial stake, monetary or otherwise, in the manner in which his separation was accomplished. The courts nevertheless consistently relied upon the intimate connection between separation procedures and matters of discipline and internal military management to support their refusal to grant judicial review.

While the recent case of *Orloff* v. *Willoughby*, 345 U. S. 83, was an action for a writ of habeas corpus for a discharge from the Army, rather than a suit

based upon an executed discharge, it is nonetheless pertinent here because again this Court went no further than to determine the scope of discretion over matters of internal Army management vested by statute in the military authorities. The Court held that the Doctors' Draft Act did not require that the Army either commission or discharge a doctor drafted under its terms and affirmed the denial of habeas corpus, despite the Court's assumption that the petitioner was "correct in stating that it has been a uniform practice to commission Army doctors" (345 U. S. at 88). In disposing of the argument that it could review the petitioner's duty assignment, the Court said (345 U. S. at 93–94):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to

its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

(*b*) The lower courts have consistently followed the principles of these cases in disposing of suits specifically seeking judicial review of allegedly unlawful military discharges. *Gentila* v. *Pace, supra; Davis* v. *Woodring, supra; Stock* v. *Department of the Air Force*, 186 F. 2d 968 (C. A. 4); *Hurley* v. *United States ex rel. Gladman*, 47 F. 2d 431 (C. A. D. C.); *Brown* v. *Royall*, 81 F. Supp. 767 (D. D. C.), affirmed, C. A. D. C., October 13, 1949, certiorari denied, 339 U. S. 952, rehearing denied, 339 U. S. 991; *Marshall* v. *Wyman*, 132 F. Supp. 169 (N. D. Cal.); *Nordmann* v. *Woodring*, 28 F. Supp. 573 (W. D. Okla.); *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529; *Palmer* v. *United States*, 72 C. Cls. 401; *Newton* v. *United States*, 18 C. Cls. 435; *Nistal* v. *Hausauer*, 308 N. Y. 146, certiorari denied, 349 U. S. 962; cf. *Bland* v. *Hartman*, 245 F. 2d 311 (C. A. 9); *Goldstein* v. *Johnson*, 184 F. 2d 342 (C. A. D. C.); see also *Bernstein* v. *Herren*, 234 F. 2d 434 (C. A. 2), certiorari denied, 352 U. S. 840; *Schustack* v. *Herren*, 234 F. 2d 134 (C. A. 2); *Bolger* v. *Marshall*, 193 F. 2d 37 (C. A. D. C.); but compare *McTernan* v. *Rodgers*, 113 F. Supp. 638 (N. D. Cal.). In *Gentila, supra*, for example, the court below ruled that Congress intended the decisions of the Army Discharge Review Board to be final and unreviewable in the courts. The same court had earlier decided in *Gladman, supra*, that it had no power

to review because the question to be determined, relating to the plaintiff's discharge, "affected the status of the relator in the National Guard as a soldier, and was therefore distinctly military in its nature" (47 F. 2d 433). In *Reid* v. *United States, supra*, the District Court held that "[t]he exact method of this soldier's discharge and the quantum or kind of character that should be given him, not being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine, while that a discharge with a very bad character is not a punishment to the man discharged within the meaning of any federal statute is settled by *U. S.* v. *Kingsley*, 138 U. S. 87 * * *" (161 Fed. at 472). Similar statements may be found in the *Marshall, Newton* and *Nistal* cases, *supra*. These lower court rulings all bear out our contention that the courts have no jurisdiction to review the administrative issuance of military discharges, because Congress has vested unfettered discretion in the Executive and has established an exclusive administrative method of review, as well as because no legal injury results from the issuance of such discharges (see *infra*, pp. 58 *ff*).

(*c*) In their efforts to establish jurisdiction to review administrative discharges, petitioners rely, *inter alia*, upon cases in which the courts have reviewed the proceedings of courts-martial or military commissions (H. Br. 19, 23; A. Br. 10). But in those cases, where liberty or life itself are at stake, this

Court has found authority to review in the broad power of the courts to issue writs of habeas corpus to free persons illegally held in custody. *Ex parte Milligan,* 4 Wall. 2 (military commission); *Ex parte Mason,* 105 U. S. 696, 697 (question of jurisdiction to issue writ reserved, "inasmuch as [the Court] has no power to review the judgments of courts-martial"); *Wales* v. *Whitney,* 114 U. S. 564; *In re Grimley,* 137 U. S. 147; *Johnson* v. *Sayre,* 158 U. S. 109; *Carter* v. *Roberts,* 177 U. S. 496; *Carter* v. *McClaughry,* 183 U. S. 365; *McClaughry* v. *Deming,* 186 U. S. 49; *Givens* v. *Zerbst,* 255 U. S. 11; *Collins* v. *McDonald,* 258 U. S. 416; *Ex parte Quirin,* 317 U. S. 1 (military commission); *In re Yamashita,* 327 U. S. 1 (military commission); *Wade* v. *Hunter,* 336 U. S. 684; *Humphrey* v. *Smith,* 336 U. S. 695; *Hiatt* v. *Brown,* 339 U. S. 103; *Whelchel* v. *McDonald,* 340 U. S. 122; *Gusik* v. *Schilder,* 340 U. S. 128; *Burns* v. *Wilson,* 346 U. S. 137; *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11; *Reid* v. *Covert,* 354 U. S. 1.

And despite this finding of jurisdiction under the *habeas corpus* statute, the Court in such cases has narrowly confined the limits of its powers. "It is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial * * *. The single inquiry, the test, is jurisdiction'. *In re Grimley,* 137 U. S. 147, 150 (1890)." *Hiatt* v. *Brown,* 339 U. S. 103, 111; see also *Swaim* v. *United States,* 165 U. S. 553, 555; Note, 67 Harv. L. Rev. 91, 160–162 (1953);

Rossiter, *op. cit. supra*, pp. 102–120. These cases establish that if the court-martial has jurisdiction of the person, jurisdiction of the offense charged, jurisdiction to impose the sentence adjudged, and is properly constituted, the civil courts have no authority to intervene. Thus in a recent case in which the petitioners had been sentenced to death by a court-martial, Chief Justice Vinson said, in affirming the dismissal of applications for writs of habeas corpus (*Burns* v. *Wilson*, 346 U. S. 137, 139–140):

> * * * the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law.
>
> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment [citing, *inter alia*, *Reaves* v. *Ainsworth*, 219 U. S. 296]. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

We have noted that the limited judicial review of court-martial sentences is founded upon express authority to issue writs of habeas corpus, conferred by statute. We submit that there is no such analogous authority and no express grant of District Court jurisdiction upon which to base review of military discharges administratively issued. And even if a court were to have such jurisdiction, the scope of review would surely not exceed that accorded in court-martial cases. Under such a standard, relief is precluded in the circumstances of the present cases, where the Army concededly had jurisdiction of petitioners, concededly had jurisdiction to determine whether their retention in the Army was clearly consistent with the interests of national security, and concededly had jurisdiction to discharge petitioners with some form of administrative discharge. The type and character of those discharges is left by statute to the discretion of the respondent. The cases we have cited above stand, at most, for the proposition that the courts only have authority to review or control the actions of the military if there is a strong showing that the action complained of exceeds the jurisdictional limits imposed upon the military.

Petitioners also cite as authority for judicial review of their military discharges cases involving administrative action in dealing with the rights or privileges of civilians[41] (H. Br. 18–23; A. Br. 9–12). As

[41] The selective service cases are in this category since the petitioning defendants in those cases were civilians who had been convicted by District Courts of refusing to submit to in-

we have shown above, very different considerations control the question of judicial review of the discretion of the Secretary of the Army exercised in discharging one admittedly a member of the Army.[a] The court below has aptly summarized the point (H. R. 123):

> * * * Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very es-

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duction under the Selective Service Act. See *Estep* v. *United States*, 327 U. S. 114; *Sicurella* v. *United States*, 348 U. S. 385; *Simmons* v. *United States*, 348 U. S. 397; *Gonzales* v. *United States*, 348 U. S. 407, cited at H. Br. 19–20 and A. Br. 12.

[a] Even as to civilian matters there are, of course, many administrative decisions which, because of the nature of the subject matter, separation-of-powers considerations, or the intent of Congress, are not subject to judicial review. See, *e. g.*, *United States* v. *Carmack*, 329 U. S. 230, 242–243; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 543; *Ludecke* v. *Watkins*, 335 U. S. 160, 163–166; *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470, 489; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303; *Butte, Anaconda & Pacific Ry. Co.* v. *United States*, 290 U. S. 127, 136, 143; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, 507; *United States* v. *Chemical Foundation*, 272 U. S. 1, 15; *Dakota Central Telephone Company* v. *South Dakota*, 250 U. S. 163, 184; *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324–325; *Martin* v. *Mott*, 12 Wheat. 19, 31–32.

sence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant, action and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of the commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As a further matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden, with which the courts are wholly unequipped to cope.

Even as to matters in a somewhat analogous civilian field, the discharge of civil service employees, the courts have narrowly circumscribed their own function. In the absence of legislative restraint upon the executive's discretionary power to remove inferior government officers and employees, the courts have consistently refused, since the founding of the Republic, to supervise the action of executive officials. Where Congress has specified the grounds of removal and prescribed certain procedures, the function of the judiciary has been held to be exhausted upon a determination that the mandate of Congress has been complied with. At no time have the courts intervened to review the basis for the executive action. *Eberlein* v. *United States*, 257 U. S. 82; *Burnap* v. *United*

States, 252 U. S. 512; *Brown* v. *Lane*, 232 U. S. 598; *Reagan* v. *United States*, 182 U. S. 419; *Keim* v. *United States*, 177 U. S. 290; *White* v. *Berry*, 171 U. S. 366; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Matter of Hennen*, 13 Pet. 230; *United States* v. *Guthrie*, 17 How. 284.

In the present cases, Congress has declined to prescribe grounds for removal or the types of discharge to be given, and has specified minimal procedures within the service, all of which have been complied with. Congress has also prescribed administrative remedies which it has deemed exclusive. Petitioners here ask the courts to disregard those limitations and to go far beyond the limits even in civilian employee cases to review, in effect, the validity of the grounds upon which their less-than-honorable discharges were based. There is no authority for such review, and no basis for judicial intervention.

II

THE DISCHARGES ISSUED TO PETITIONERS DO NOT FURNISH A BASIS FOR CLAIMS UPON WHICH RELIEF MAY BE GRANTED SINCE THEY DO NOT INVADE ANY LEGALLY PROTECTED RIGHTS OF PETITIONERS

Even if the administrative issuance of military discharge certificates were not inherently immune from judicial review, petitioners still would not be entitled to relief. As in every action in the federal courts, petitioners must present a justiciable case or controversy. "The touchstone to justiciability is injury to a legally-protected right * * *" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 140–

141). In the absence of a showing of such injury, the Court will not pass upon statutory or constitutional issues. *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324–325. In *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89–90, this Court said:

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. * * * It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

Petitioners have failed to show such actual prejudicial interferences or injuries flowing from their military discharges. Their speculative contentions as to future adversities, arising from the possible loss of state veterans' benefits and from apprehension of lowered community esteem, are not injuries of the kind which give rise to federal jurisdiction. Nor are generalizations about deprivations of civil rights sufficient.

A. THE ISSUANCE OF LESS-THAN-HONORABLE DISCHARGES TO PETITIONERS HAS NOT CAUSED LEGAL INJURY

1. *The possible denial of state benefits.* Both petitioners concede, expressly (H. Br. 33) or by implication (A. Br. 15), that they are eligible for the statutory veterans' benefits administered by the Federal

Government. This is so because Harmon's General Discharge (under honorable conditions) entitles him "to full rights and benefits" (Army Reg. 615–360, Para. 7, *supra*, fn. 30, p. 32; see also Table, "Incidents of Discharge", H. R. 59), and because Abramowitz's earlier honorable separation from active duty has the same effect.[43] Petitioners are therefore forced to argue that the possible loss of New York State veterans' benefits constitutes legal injury remediable in the federal courts (H. Br. 33; A. Br. 15–16). To this there are several answers.

First, petitioners' claims are purely speculative and therefore furnish no basis for relief. *United Public Workers* v. *Mitchell, supra.* There is no showing that they have been denied state benefits; no certainty that they will ever have occasion to apply for such benefits as scholarships, civil service preferences, or early retirement from the school system; and even less certainty that their applications would be denied if submitted. Petitioners' eligibility for these benefits depends, of course, upon the State's construction of its own statutes. It is entirely possible that the phrase "honorably discharged" which appears in some of these statutes would include a discharge under honorable conditions, such as Harmon's, or Abramowitz's original discharge.[44] See, *e. g.*, N. Y. Gen. Bus.

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[43] See Appendix B, *infra*, pp. 82–88.

[44] Harmon misquotes the statutes cited on page 33 of his brief. He states that certain benefits are available only to "veterans holding 'honorable discharge' certificates", implying that these would not be available to a veteran discharged, as he was, with a "General Discharge (under honorable conditions)". But these statutes state that the benefits are available to "honorably dis-

Law, Sec. 32, McKinney Bk. 19; N. Y. Mil. Law, Sec. 245, McKinney Bk. 35. We know of no New York authority to the contrary. Indeed, as to both Harmon and Abramowitz, it is highly probable that State officials will accord the same efficacy to Harmon's General Discharge and to Abramowitz' honorable separation from active duty as does the Federal Government.[45] *Horylev* v. *New York State Bonus Commission*, 220 App. Div. 345, 221 N. Y. S. 548, relied upon by petitioner Abramowitz (A. Br. 16), indicates that this would be the case.[46]

In any event, these veterans' benefits "are gratuities. They involve no agreement of parties; and the grant of them creates no vested right". *Lynch* v. *United States*, 292 U. S. 571, 577; *Slocumb* v. *Gray*, 179 F. 2d 31, 34 (C. A. D. C.). Even if petitioners were to be denied such benefits they could not claim a

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charged" veterans, in which category he falls. N. Y. Gen. Mun. L. Sec. 148; N. Y. Educ. L. Sec. 609; N. Y. Mil. L. Sec. 245. The fourth statute cited, N. Y. Mil. L. Sec. 250, was amended by L. 1954, c. 431 to permit the recording of "Any certificate * * * of the honorable separation from or service in the armed forces * * *".

[45] We cannot agree with Harmon that "New York statutes make a marked distinction between an 'honorable discharge', and a discharge 'under honorable conditions'. See, *e. g.*, and compare *N. Y. Educ. L.*, § 608 with *N. Y. Educ. L.* § 609 * * *" (H. Br. 33, n. 14): Neither quoted phrase appears in either statute. The former speaks of "a discharge certificate other than honorable", the latter of "honorably discharged veterans". We do not read the language of either section as necessarily referring only to an "Honorable Discharge" and not to a "General Discharge (under honorable conditions)".

[46] Abramowitz contends that New York benefits turn on the character of discharge from the Army and not of release from active service. But the very statute quoted in his next sentence

deprivation of justiciable property rights.[47] Moreover, it is hardly likely that the justiciability in a federal court of the character of a United States Army discharge could turn upon the availability or lack of availability of veterans' gratuities in the particular soldier's state of domicile.

2. *The alleged stigma of a less-than-honorable discharge.* Petitioners' chief claim of injury is based upon the social stigma and economic prejudice which they allege will result from their receipt of discharge certificates reciting "General Discharge (Under Honorable Conditions)" (H. R. 112) and "Undesirable Discharge" (A. R. 10), respectively, rather than certificates reciting "Honorable Discharge * * * awarded as a testimonial of Honest and Faithful service".[48] It may well be that a General or Undesirable Discharge Certificate shown to a potential employer, whether in the Government or elsewhere, might dispose him against hiring an applicant who has been so discharged. The same result may follow from a discharge for cause from civilian government or private employment, as the court below pointed out (H. R. 126). But these disadvantageous possibilities are not

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refutes this: "a member of the armed forces of the United States who served therein in time of war, who was honorably discharged *or released under honorable circumstances from such service*"—not "released from such armed forces" (A. Br. 15).

[47] The actions of the United States Veterans Administration in granting or denying applications for benefits administered by it are, of course, not subject to judicial review. 38 U. S. C. 11a-2 and 705; *Lynch* v. *United States*, 292 U. S. 571, 587; *Hahn* v. *Gray*, 203 F. 2d 625, 626 (C. A. D. C.).

[48] These words appear on the Honorable Discharge Certificate, DD Form 256A.

legal consequences of the prior discharge. Petitioners cite no statutes or regulations, federal or state, which prohibit persons with discharges such as theirs from practicing whatever professions they choose, or which otherwise restrict them in any manner. Any embarrassment petitioners may encounter is *damnum absque injuria.* Cf. *Angilly* v. *United States,* 199 F. 2d 642, 644 (C. A. 2).

And, once again, the purported injuries are at most speculative. This is particularly true in Harmon's case, where there has been no showing whatsoever that stigma results from a "General Discharge (under honorable conditions)" or that the public distinguishes between this and an Honorable Discharge. The Honorable Discharge doubtless carries some prestige which the General Discharge lacks, since it bears on its face the words "awarded as a testimonial of honest and faithful service". But this difference does not mean that *stigma* attaches to the General Discharge under honorable conditions.

If petitioners' contentions in this regard were to be sustained, *every* soldier issued a discharge less than honorable, on whatever grounds, suffers legal injury entitling him prima facie to a judicial determination of the validity of his discharge. See H. Br. 35. We cannot believe that this is so.

B. THE NOTATION "AR 604–10 APPLIES" ON PETITIONER ABRAMOWITZ'S DISCHARGE CERTIFICATE HAS NOT CAUSED LEGAL INJURY

1. *Petitioners have not been unlawfully "defamed".* Petitioners assert that the notation "AR 604–10 applies" on a discharge certificate is equivalent to a no-

tation "Discharged under the Army's Personnel Security Regulations"; that this interpretation is in turn equivalent to a notation "Disloyal" or "Subversive"; and that therefore the notation "AR 604–10 applies" compounds the purported stigma of a less-than-honorable discharge by affixing a "badge of infamy".[40] In fact, the most that can be said of the notation is that it indicates a finding that petitioners' retention in the Army has been found to be "not clearly consistent with the interests of national security". The specific factors which led to this conclusion are not indicated upon the discharge certificate, report of separation, or in any other public record. Reduced to its essentials, petitioners' argument in this respect is that the Army cannot state the reasons for its action when it discharges a soldier, without being guilty of publishing an unlawful defamatory finding.

Petitioners rely primarily upon *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 140, *Wieman* v. *Updegraff*, 344 U. S. 183, 191, and *Peters* v. *Hobby*, 349 U. S. 331, 347, as establishing a right to

[40] Petitioner Harmon's General Discharge Certificate contains no analogous notation (H. R. 112), nor does the accompanying Report of Separation (H. R. 111). He nevertheless takes the peculiar position that the Court must assume that such allegedly unlawful notations, necessary to establish his arguments relating to the "stigma" of a discharge certificate publicizing its security basis, have been inserted by the Army. He cites as authority for this proposition three cases in which the Court applied the presumption of administrative regularity and legality—not of purported illegality. See H. Br. pp. 42–43. Despite the inapplicability of this issue to Harmon's case, we shall nevertheless continue to refer to "petitioners", both in order to avoid confusion and because Harmon discusses this point at length as if the notation had been made in his case.

freedom from government defamation applicable to their cases (H. Br. 27, 40, 41, 43; A. Br. 7, 13, 22). In *Joint Anti-Fascist*, the petitioners had each been designated as "Communist" organizations (341 U. S. at 125); in *Wieman*, the Court said that when a person is "excluded from public employment on *disloyalty* grounds * * * the stain is a deep one; indeed, it has become a badge of infamy" (344 U. S. at 190–191; emphasis added); and *Peters* reiterated that "'a badge of infamy' attaches to a public employee found *disloyal*" (349 U. S. at 347; emphasis added). In *Joint Anti-Fascist* and *Peters*, it was assumed that the determinations involved might be actionable defamation *if they were unauthorized*. Assuming that rule, the determinations in the present cases were validly authorized and petitioners do not challenge their separation from the service on security grounds[**] (*supra*, pp. 20–21).

No principle is better settled than that the Executive Branch has plenary and exclusive power to determine, within such limitations as may be imposed by Congress or the Constitution, which of its personnel shall be retained in its service and which shall be separated in order to promote the efficiency of the service. *Eberlein* v. *United States*, 257 U. S. 82, and other cases cited, *supra*, pp. 57–58. A *fortiori*, the same branch has co-extensive authority to determine who shall be separated in order to promote the security

[**] Petitioner Harmon quotes the following (H. Br. 8, n. 2) from the District Court opinion: "'* * * [I]n its argument [the Government] concede[d] that it has never found [petitioner] either disloyal or loyal.' (137 F. Supp. 475, 477.)"

of the service and of the Government. In the former class of cases, the determination upon which the discharge is based is not actionable; indeed, the courts have refused to grant relief to civil servants dismissed on charges involving serious criminal misconduct, such as the acceptance of bribes (*Eberlein* v. *United States*, *supra*), illegally withholding collected customs duties (*Angilly* v. *United States*, 199 F. 2d 642 (C. A. 2)), violation of the prohibition laws (*Croghan* v. *United States*, 116 C. Cls. 577), and repeated attempts at seduction by force (*Golding* v. *United States*, 78 C. Cls. 682, certiorari denied, 292 U. S. 643; see Transcript of Record in No. 907, October Term, 1933, pp. 5–6). The same is true even where it is conceded that executive discretion has been erroneously exercised. *Eberlein* v. *United States*, *supra*; cf. *Ginn* v. *United States*, 110 C. Cls. 637; *Kellom* v. *United States*, 55 C. Cls. 174.

The same rules must apply to military dismissals to promote the security of the service and nation. Petitioners therefore do not contest the absolute power of the respondent to determine that their retention was inconsistent with security, on the basis of the information relied on, and to effect their dismissals accordingly, subject only to compliance, as here, with such procedures as Congress has prescribed.[30] Petitioner Abramowitz's necessary conces-

[30] Petitioners' claims thus stand in sharp contrast to those presented in the *Joint Anti Fascist*, *Bailey*, *Peters*, and *Wieman* cases, in all of which questions of basic power were raised. The same may be said of other cases relied on by petitioners. See, *e. g.*, *United States* v. *Lovett*, 328 U. S. 303; *American Communications Association* v. *Douds*, 339 U. S. 382; *Garner*

sion is worth repeating here (see *supra*, p. 21): "For present purposes, we can assume that the Army has an absolute right to discharge any member of the Armed Forces for any reason which, in its unrestricted judgment, seems to be necessary for its best interests" (A. Br. 25). Similar concessions are made by Harmon.[51] Petitioners' claims of actionable defamation therefore rest upon admittedly valid determinations, made by government officials concededly acting within the scope of their lawful authority, published in the form of the notation, "AR 604–10

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v. *Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485; *Barsky* v. *Board of Regents*, 347 U. S. 442; *Galvan* v. *Press*, 347 U. S. 522; *Cole* v. *Young*, 351 U. S. 536; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar*, 353 U. S. 252; *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843; *Nathan* v. *Dulles*, 129 F. Supp. 951 (D. D. C.), appeal dismissed, 225 F. 2d 29 (C. A. D. C.); *Shachtman* v. *Dulles*, 225 F. 2d 938 (C. A. D. C.); *Boudin* v. *Dulles*, 136 F. Supp. 218 (D. D. C.), modified, 235 F. 2d 532 (C. A. D. C.); *Parker* v. *Lester*, 227 F. 2d 708, on remand, 141 F. Supp. 519 (N. D. Cal.), affirmed, 235 F. 2d 787 (C. A. 9).

[51] Harmon's brief includes the following statements: "While Congress may have authorized the Secretary of Defense to remove 'security risks' from the Armed Forces, Congress did not, and could not, authorize him or the Secretary of the Army * * * to stigmatize an inductee * * *" (H. Br. 15); "The constitutional protection[s] * * * are applicable, not to petitioner's separation * * * but to the stigmatization of his record * * *" (H. Br. 16); "Petitioner concedes that the Directive, to the extent it requires the removal of any soldier from the Army where retention is 'not clearly consistent with the interests of national security' is validly authorized" (H. Br. 25); "We agree that respondent is authorized to separate petitioner from the Army establishment for any reason deemed appropriate,

applies".[52] That such valid official action by the head of an Executive Department cannot serve as the basis for a cause of action in defamation has been conclusively established by the courts. *Spalding* v. *Vilas*, 161 U. S. 483; *Mellon* v. *Brewer*, 18 F. 2d 168 (C. A. D. C.), certiorari denied, 275 U. S. 530; *Glass* v. *Ickes*, 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643; *Farr* v. *Valentine*, 38 App. D. C. 413; *De Arnaud* v.

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including reasons of 'national security'" (H. Br. 31): "Petitioner does not complain of the fact of his separation from the Army. He complains only of the 'badge of infamy' he must wear * * *" (H. Br. 40); "Whatever a 'security risk' is, we agree that the courts cannot compel the Army to retain 'one' in its service. * * * Petitioner took pains to make clear below that * * * his case had nothing to do with his retention * * * or discharge * * *. It was applicable only to the 'badge of dishonor' * * *" (H. Br. 46); "The Army had the power to discharge Harmon if it was not satisfied to keep him in the service, but it could not discharge him and defame him at the same time" (H. Br. 47).

[52] It is significant to note in this connection the relief for which petitioners pray. They seek only Honorable Discharges, free from notations. Since they acknowledge the unassailability of the Secretary's determinations, petitioners do not ask that these determinations be stricken from their military records. Compare *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918 (Transcript of Record, No. 49, October Term, 195[illegible] p. 16); *Peters* v. *Hobby*, 349 U. S. 331, 349. And presumably because admittedly lawful determinations may not be expunged from the records, petitioners do not pray for injunctions restraining the Secretary of the Army or his subordinates from divulging the grounds for petitioners' discharges to persons who might inquire why petitioners were discharged before the expiration of their normal terms of service.

Ainsworth, 24 App. D. C. 167, appeal dismissed, 199 U. S. 616.

Moreover, there is nothing inherently defamatory in the determinations that petitioners' continued retention was "not clearly consistent with the interests of national *security*". [Emphasis added.] Certainly, this determination cannot be automatically equated, as Harmon attempts to do,[53] with those involved in the *Joint Anti-Fascist* case ("Communist"), the *Bailey* case (reasonable grounds for belief that the petitioner was *disloyal*),[54] or the *Peters* case (reasonable doubt as to *loyalty*). Nor can it be said that the possible stigma arising from such a determination is any greater than that attached to a refusal to sign an oath denying membership in the Communist Party, by one whose position is such that the oath requirement may not be simply ignored. Cf. *American Communications Association* v. *Douds*, 339 U. S. 382; *Gerende* v. *Board of Supervisors*, 341 U. S. 56; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716.

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[53] Harmon makes the bold assertion that (H. Br. 40–41) "It has been clearly settled that executive action resulting in a determination that an organization or individual is disloyal, subversive *or a 'security risk'* cannot be made without some sort of hearing. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123" (emphasis added). This is indeed a broad reading of that case. Harmon obviously does not mean what he says, since he has no objection to being discharged from the Army on a security determination, without a hearing, so long as he receives an Honorable Discharge.

[54] In *Bailey* it was held by the Court of Appeals that even the finding in that case did not give rise to legal injury. Cf. *Angilly* v. *United States*, *supra*.

Petitioners' notion that a determination that a particular individual's presence in the Armed Forces is undesirable from a security standpoint—a determination which is concededly lawful in itself—must be forever cloaked in secrecy by the Government, at the risk of being compelled to provide "all the safeguards of a judicial trial, or * * * of a General Court-Martial" (H. Br. 41), is difficult to comprehend. The Government, whether through one of the Armed Services or the Selective Service System, must at one time or another render a judgment as to the fitness, from a security standpoint, of every male who qualifies for military service under the Universal Military Service and Training Act. As Judge Prettyman pointed out below, an adverse determination of this question at the induction center may prove more onerous than such a determination after induction (H. R. 126):

> Stigma attaches on rejection from military service as a security risk. Indeed, if one be rejected entirely, on account of being a security risk, the adverse effects are greater than upon receiving a General Discharge Under Honorable Conditions. Many benefits attach to status under the latter which do not attach to rejection. And the intangibles of stigma attach in either event. Nevertheless it certainly cannot be urged that the Army may not reject, without judicial review, as a security risk one registered for service.

2. *Petitioners have not suffered "punishment" in the legal or constitutional sense.* Closely related is the claim that the General and Undesirable Discharges and the notation "AR 604–10 applies" con-

stitute "punishment" for petitioners' pre-induction activities, and that the action of the Secretary of the Army therefore violates the constitutional prohibitions against bills of attainder and *ex post facto* laws (H. Br. 15–16, 22–24, 43–48; A. Br. 6–7, 13–30). That a possible stigma arising from a security finding is not such "punishment" is evidenced by what we have already said (*supra*, pp. 62–70); moreover, the theory that an administrative discharge, even an Undesirable one, is "punishment" in the legal or constitutional sense has been rejected alike by Congress and the courts.

The statutes cited and discussed *supra at* pp. 23–30, show that Congress recognizes only two kinds of punitive discharges, Bad-Conduct and Dishonorable, both issued pursuant to court-martial sentences. "Administrative discharges"—including Undesirable Discharges—are authorized for issuance when a court-martial sentence of punitive discharge is set aside. See *supra*, pp. 26–27, n. 20. The Army likewise views administrative discharges as non-punitive: "Administrative elimination is not punishment. The fact that an undesirable discharge may be awarded which may later penalize an individual, is immaterial from the standpoint of elimination of the undesirable individual." Army Reg. 635–208, Para. 9 (e). The New York Court of Appeals drew this same line in *Nistal* v. *Hausauer*, 308 N. Y. 146, 154, certiorari denied, 349 U. S. 962:

> * * * the distinction seems plain that a dishonorable discharge has always been considered punishment for wrongdoing, whereas a discharge without honor means only that the sol-

> dier is being discharged without the kind of commendation involved in an honorable discharge.

And in *United States* v. *Kingsley*, 138 U. S. 87, 89, 92, this Court ruled that a marine discharged as "unfit for service, character bad", as the result of a series of offenses but without court-martial proceedings, was not "discharged * * * by way of punishment for an offence" so as to render him subject to a statutory forfeiture of travel pay and subsistence. See also *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529; Howland, *op. cit. supra*, p. 435; Winthrop, *op. cit. supra*, p. 549; Davis, *A Treatise on the Military Law of the United States*, pp. 353, 356 (3d ed., 1913); Pasley, *op. cit. supra*, 41 Cornell L. Q. 545, 552–568.

Since the discharges here do not constitute "punishment", there is plainly no bill of attainder or unlawful *ex post facto* action (see H. Br. 40–45;[55] A. Br. 27). A bill of attainder within the constitutional prohibition is "a legislative act which inflicts punishment without a judicial trial". *United States* v. *Lovett*, 328 U. S. 303, 315; *Cummings* v. *Missouri*, 4 Wall. 277, 323. These discharges do not inflict punishment within the holdings in *Lovett* and *Cummings*. Moreover, this is not "legislative action" in the bill-of-attainder sense, even though the administrative action is authorized by statute. While the court

[55] Although the cited pages of the Harmon brief are headed "A. With Respect to the Sixth Amendment", the discussion relates primarily to bills of attainder and the cases cited generally relate to this area; none involves the Sixth Amendment.

below in *Bailey* v. *Richardson,* 182 F. 2d 46, 54–55, affirmed by an equally divided court, 341 U. S. 918, held that a three-year proscription from Government employment administratively imposed upon grounds of disloyalty was not authorized by Act of Congress or executive order and analogized it to a bill of attainder by reference to the *Lovett* case, the court distinguished a general order barring persons from Government employment which "might well be valid" from the one imposed upon Miss Bailey "as a matter of individual adjudication". Here, the Secretary's action was authorized, there is no proscription, and the regulations are of general applicability. And while the discharges here at issue were based upon previous activities of petitioners, the absence of "punishment" renders such actions immune from invalidation on *ex post facto* grounds. Cf. *American Communications Association* v. *Douds,* 339 U. S. 382, 413–414; *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716, 722; *Hawker* v. *New York,* 170 U. S. 189, 196–197; *Marcello* v. *Bonds,* 349 U. S. 302, 314; *Mahler* v. *Eby,* 264 U. S. 32, 39.

For the same reasons, there is no necessity to impose upon the charges and proceedings here involved the requirements of a criminal indictment and trial, as petitioners would do (H. Br. 15–16, 40–45, 47; A. Br. 7, 21–24, 27–30). Discharge proceedings are of course not criminal proceedings, and the charges made are not criminal charges. That the Sixth Amendment confers rights only in criminal prosecutions has long been settled. *United States* v. *Zucker,* 161 U. S. 475; *Hepner* v. *United States,* 213 U. S. 103; *Oceanic Navigation Co.* v. *Stranahan,* 214

U. S. 320, 337–338; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 174, 180, concurring opinion of Mr. Justice Douglas. Once again, the absence of the essential factor of "punishment" precludes any possibility of constitutional invalidity. Cf. *Ullman* v. *United States*, 350 U. S. 422, 430–431.[56]

[56] Petitioner Abramowitz complains of the "vagueness" of the criteria utilized in determining whether an individual's retention is consistent with security, as found in Army Reg. 604–10, Sec. 13b (A. Br. App., pp. 41–43). This contention again seeks to equate this to a criminal proceeding. Yet at the same time petitioner concedes that dismissal can be based upon any reason which the respondent, in his "unrestricted judgment", seems to be necessary for the Army's best interests (A. Br. 25). Since neither the concededly valid dismissal, the accompanying discharge, or the notation thereon, have caused petitioner legal injury, the precision of the criteria is immaterial. But, in any event, the criteria challenged by petitioner refer only to types of acts and associations which "warrant consideration of action to effect" a determination that a soldier's retention is not consistent with security, and are merely guideposts to administrative action. Considering the multitude of factors which may properly be taken into account in making the ultimate determination, these guideposts are as specific as could reasonably be expected. Hence, even if the constitutional doctrine of vagueness had any application to this type of administrative instruction, the requirements of that doctrine would be met. *Lichter* v. *United States*, 334 U. S. 742; *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 104; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *Yakus* v. *United States*, 321 U. S. 414, 423–424; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 574; *Hampton & Co.* v. *United States*, 276 U. S. 394.

Both petitioners have been accorded hearings and extensive administrative consideration of their claims respecting the character of their discharges (see *supra*, pp. 6–10, 12–14). They do not complain of any violation of the procedures required by statute or regulation. These procedures are all that are required to validate the discharges given them. Cf. *Reaves* v. *Ainsworth*, 219 U. S. 296, 305.

3. *Petitioners' First Amendment rights have not been violated.* The argument is also made that the actions of the Secretary abridge petitioners' First Amendment right to freedom of speech (H. Br. 15–16, 45–48; A. Br. 25–26). Clearly, the discharges are not *prior* restraints, since petitioners are as free now to express their opinions and political views as they were before they were inducted into the Army. Nor are they, as we have seen, punishment of any kind, including punishment for the past exercise of First Amendment rights. The respective characters of the discharges are ancillary to the Secretary's valid and unchallenged determinations that the interests of national security required petitioners' separation. Petitioner Harmon (H. Br. 45) relies on the opinion of this Court in *American Communications Association* v. *Douds, supra,* for the proposition that First Amendment rights may not be violated by indirect restraints and punishment. But in upholding the validity of Section 9 (h) of the National Labor Relations Act, this Court stated (339 U. S. at 398, 402–403):

> * * * the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. * * *
>
> * * * * *
>
> * * * we have here no statute which is either frankly aimed at the suppression of dangerous ideas nor one which, although ostensibly aimed at the regulation of conduct, may actu-

ally "be made the instrument of arbitrary suppression of free expression of views".

That is equally true here. See also, *e. g., United Public Workers* v. *Mitchell,* 330 U. S. 75; *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716; *Adler* v. *Board of Education,* 342 U. S. 485; *United States* v. *Harriss,* 347 U. S. 612, 625–626; *Teamsters Union* v. *Vogt, Inc.,* 354 U. S. 284. There is no violation of the First Amendment.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be affirmed.

Respectfully submitted.

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NOVEMBER 1957.

APPENDIX A

1. The pertinent constitutional provisions are as follows:

Article I:

SECTION 8. The Congress shall have the Power * * *

* * * * *

To raise and support Armies, * * *

* * * * *

To make Rules for the Government and Regulation of the land and naval Forces;

* * * * *

SECTION 9. * * * No Bill of Attainder or ex post facto Law shall be passed.

* * * * *

Article II:

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States * * *.

* * * * *

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

2. Section 1 of Chapter II of the Act of June 4, 1920, 41 Stat. 809, as amended, 10 U. S. C. 652a provides as follows:

> No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial.

3. Section 4 (b) of the Universal Military Training and Service Act, 62 Stat. 606, as amended, 50 U. S. C. App. 454 (b), provides as follows:

> Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section].

4. The Armed Forces Reserve Act of 1952, 66 Stat. 481, Sections 248 and 249, 50 U. S. C. 991, 992, provide in pertinent part as follows:

> SECTION 248. Subject to the provisions of this Act, the discharge of commissioned officers of the reserve components shall be effected at the pleasure of the President, and the discharge of other members of the reserve components shall be in accordance with regulations promulgated by the appropriate Secretary.
>
> SECTION 249. (a) * * *
>
> (b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.
>
> (c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) of this section shall be given a discharge under honorable conditions unless—
>
> > (1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved findings of a board of officers convened by competent authority, or
> >
> > (2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings.

5. Section 301 of the Servicemen's Readjustment Act of June 22, 1944, c. 268, 58 Stat. 286, as amended, 38 U. S. C. 693h, provides in pertinent part as follows:

> The Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy,

after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Army, Air Force and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man * * * the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel * * *. Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, respectively * * *.

6. Section 207 of the Legislative Reorganization Act of August 2, 1946, 60 Stat. 837, as amended, 5 U. S. C. 191a, provides in pertinent part as follows:

The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Depart-

ments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * *.

7. Section 5 of the National Security Act Amendments of 1949, 63 Stat. 580, as amended, 5 U. S. C. 171a (c) (4), provides as follows:

> The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority, and control of the Secretary of Defense.

APPENDIX B

VETERANS ADMINISTRATION

OFFICE OF GENERAL COUNSEL

Washington 25, D. C., June 22, 1956.

MR. GEORGE COCHRAN DOUB,
Assistant Attorney General,
Civil Division, Department of Justice,
Washington 25, D. C.

DEAR MR. DOUB: This is in response to your letter of May 29, 1956, respecting the case of *Howard D. Abramowitz* vs. *Wilber M. Brucker,* D. C. Civil Action No. 2140–56.

In your letter you say:

> This office is presently representing the Secretary of the Army who is defendant in the above captioned action by a former soldier discharged from the enlisted reserve as a security risk with an Undesirable Discharge Certificate. Plaintiff seeks an Honorable Discharge Certificate. The plaintiff * * * alleges that he was separated from active duty after twenty months of service with a certificate of honorable separation. He also alleges that, as a result of his discharge with an Undesirable Discharge Certificate from the enlisted reserve, he "has been and will continue to be deprived of substantial monetary benefits and rights as a veteran under both federal and state legislation. * * *"

On the foregoing facts you then ask the following questions:

> (1) Has plaintiff ever been denied veterans' benefits by the Veterans Administration; and

> (2) Does plaintiff's discharge from the enlisted reserve as an undesirable security risk vitiate the eligibility for veterans' benefits he would otherwise enjoy as a result of his separation from active service under honorable conditions.

This office has obtained the file of Mr. Abramowitz from the Veterans Administration Regional Office, Brooklyn, New York. It shows that Mr. Abramowitz served honorably during the Korean Conflict. Thereafter, he made application to the Veterans Administration for the following benefits: compensation, dental treatment, and education and training allowance.

Medical and clinical records of the veteran were obtained from the Department of the Army, and these records were considered in adjudication of his applications for compensation and for dental treatment. As to the compensation, the veteran in a letter of May 19, 1954, was informed as follows:

> Service connection has been established for your defective hearing condition, but not to a compensable degree; eye condition claimed by you is not shown by the evidence of record; headaches condition, rating is deferred pending receipt of additional evidence requested from you.

The veteran requested and was granted further time to submit evidence on the last-mentioned possible disability, but it has not been supplied, and the claim has now lapsed.

As to the application for dental treatment, the veteran was examined on September 25, 1953, and his dental condition was found to be service-connected in part. He was rated entitled to treatment for this part.

The other application of the veteran was for education and training under Title II of Public Law 550,

82d Congress, 38 USCA 911–966. This application was approved.

With regard to your second question, respecting the result of the discharge from the enlisted reserves as an undesirable security risk, it may be stated as a general rule that the matter of entitlement or nonentitlement to benefits administered by the Veterans Administration is ordinarily governed by the character of discharge from an active duty status, and status, lack of status, or termination of status in the reserves is not pertinent, in the absence of related active duty or authorized training duty of the reservist.

The character of service requisite to entitlement to veterans' benefits is established by statute. Section 300 of Title I, Public Law 346, 78th Congress, 38 USCA 693g, provides:

> The discharge or dismissal by reason of the sentence of a general court martial of any person from the military or naval forces, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, shall bar all rights of such person, based upon the period of service from which he is so discharged or dismissed, under any laws administered by the Veterans' Administration: Provided, That in the case of any such person, if it be established to the satisfaction of the Administrator that at the time of the commission of the offense such person was insane he shall not be precluded from benefits to which he is otherwise entitled under the laws administered by the Veterans' Administration: And provided further, That this section shall

not apply to any war risk Government (converted) or national service life-insurance policy.

Section 1503 of Title VI of the same Act, 38 USCA 697c, is as follows:

> A discharge or release from active service under conditions other than dishonorable shall be a prerequisite to entitlement to veterans' benefits provided by this Act or Public Law Numbered 2, Seventy-third Congress, as amended.

The foregoing statutory provisions were considered in Administrator's Decision No. 655, June 20, 1945. In that case, the veteran was honorably discharged from the Navy on September 27, 1942. He had a second period of service, June 11, 1943 to September 1, 1944, from which he was dishonorably discharged. The question presented was whether the veteran was entitled to education and training under Title II of Public Law No. 346. (Part VIII of Veterans Regulation No. 1 (a), 38 USCA Ch 12A).

In the decision, it was pointed out that section 300, which barred rights of a person discharged under the conditions set forth, made the bar apply only to benefits or rights "based upon the period of service from which he is so discharged or dismissed." It was then said, inter alia:

> This language clearly implies that such a discharge or dismissal from one period of service shall not operate as a bar where the claim is based on another period of service which meets the requirements of the particular benefit claimed * * *. A similar provision limiting the bar to all rights based on the particular period of service from which the person is discharged or released under dishonorable conditions does not appear in the language either of section 700 (a) or of section 1503. The sections in

> question all appear in the same Act and obviously must be read together. Especially must this be so since section 300 by its specific terms refers to all laws administered by the Veterans' Administration. Further, it is unreasonable to believe that Congress intended to limit the effect of a dishonorable discharge for one of the grave offenses mentioned in section 300 to the period of service from which it was received and to permit a dishonorable discharge for a lesser offense to constitute a bar to rights for all periods of service.

It was held accordingly with respect to the benefit claimed that the dishonorable character of the last discharge did not vitiate the entitlement of the veteran predicated on his prior honorable service. Although the conclusion was given in terms of the particular benefit involved, the proposition set forth is not limited to this one benefit.

As to the instant question, there has been only one period of active service, and that was under honorable conditions. If there had been a subsequent period of active service, and if further such subsequent service were terminated by a dishonorable discharge on the ground that the person concerned was an undesirable security risk, there would nevertheless remain the entitlement of the veteran to veterans' benefits in view of his prior honorable discharge.

There is another statute which bears on the matter of disentitlement, though not from the aspect of character of service. Section 4 of Public Law 144, 78th Congress, 38 USCA 728, is as follows:

> Any person shown by evidence satisfactory to the Administrator of Veterans' Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future benefits under laws administered by the

> Veterans' Administration pertaining to gratuities for veterans and their dependents: Provided, however, That the Administrator of Veterans' Affairs, in his discretion, may apportion and pay any part of such benefits to the dependents of such person not exceeding the amount to which each dependent would be entitled if such person were dead.

Your letter does not state the reason why the veteran was regarded as a security risk. It will be assumed for purpose of the question that the discharge is connected with possible Communist affiliation or activity. Such connection with Communism would not be mutiny, treason or sabotage, but it might seem to indicate the last-named offense, viz: rendering assistance to an enemy of the United States or of its allies.

It has been held, however, that the quoted section does not establish a loyalty test or standard with respect to veterans' benefits, nor does it discriminate between veterans on the ground of political belief. Ops Sol 513–47, 127–49. Further, being a Communist does not constitute guilt of the particular offense in the absence of affirmative evidence of an overt act or of a court conviction, as under the Smith Act, 18 USCA 2385, relating to activities during hostilities. Op GC 16–54. Hence being a security risk because of connection with Communism would likewise not constitute guilt or presumption of guilt. Since the end of hostilities in Korea, moreover, there is no longer an "enemy" as the word is used in section 4, Public Law 144. Op Sol 8–52.

In summary, the discharge of the veteran from the reserves as a security risk has not resulted in the denial to him of benefits administered by this Agency, arising from his prior honorable discharge from the

active service. Nor does his discharge from the reserves, standing alone, vitiate any entitlement to benefits under present legislation.

Very truly yours,

GUY H. BIRDSALL,
General Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON III, PETITIONER

v.

WILBER M. BRUCKER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY

No. 141

HOWARD D. ABRAMOWITZ, PETITIONER

v.

WILBER M. BRUCKER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

This Supplemental Memorandum is submitted by the respondent, pursuant to Rule 41 (5) of the Revised Rules of this Court, in order to discuss new material, incorporated by reference into petitioner Harmon's Reply Brief (Br. 9, note 13a), from an article by William K. Jones entitled *Jurisdiction of the Federal Courts to Review the Character of Mili-*

tary Administrative Discharges, which was published in the November 1957 issue of the Columbia Law Review (Vol. 57, No. 7, pp. 917–974), subsequent to the filing of the Brief for the Respondent in these cases. The matter referred to (*id.* at 966–971) deals with the legislative history of Section 207 of the Legislative Reorganization Act of 1946 (60 Stat. 837, 5 U. S. C. 191a[1]), and more particularly with the amendment to that section enacted by the Act of October 25, 1951, 65 Stat. 655, 656.

The thesis propounded by Mr. Jones and adopted by petitioner Harmon is summarized as follows at pp. 8–9 of his Reply Brief:

> * * * the finality provision of Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, 5 U. S. C. 191a "actually was enacted with the intention that * * * decisions of the [Army Board for the Correction of Military Records] adverse to the veteran should be subject to the fullest judicial review" and * * * Congress, fully aware that 15,000 ex-servicemen were then seeking correction of their military records, intended that "the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances".

In his article, Jones relies primarily upon the legislative history of the 1951 amendment to support these conclusions.[2] We submit that his conclusions are

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[1] Now 10 U. S. C. 1552; see Brief for Respondent, p. 3, note 2.

[2] The significant legislative history of the 1951 amendment is found, chronologically, in the following: V *Hearings Before the House Committee on Armed Services* [*No. 212*], *Subcommittee Hearing on H. R. 6813, To Amend Section 207 of the Legislative Reorganization Act of 1946 so as to Authorize*

diametrically opposed to those indicated by a thorough analysis of the material upon which he relies.

1. As we have pointed out in our Main Brief at pp. 35–42, Congress originally enacted Section 207, in 1946, in order to provide an administrative substitute for the enactment of private bills for the correction of military or naval records, including military discharges. The legislative history of the original enactment demonstrates that Congress wished to relieve itself of the burdens of considering claims which were theretofore cognizable in no forum other than Congress itself.[3] This fundamental point was repeatedly

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Payment of Claims Arising from the Correction of Military or Naval Records, 81st Cong., 2d Sess. (June 13, 1950), pp. 7239–7245 ("*Subcommittee Hearings* [*212*]" hereafter); I *Hearings Before the House Committee on Armed Services* [*No. 19*], *Subcommittee Hearings on H. R. 1181* [*etc.*], 82nd Cong., 1st Sess., pp. 353–372 (May 3, 1951), 372–400 (May 7, 1951), and 400–403 (May 10, 1951; executive session) ("*Subcommittee Hearings* [*No. 19*]" hereafter); I *Hearings Before the House Committee on Armed Services* [*No. 21*], *Full Committee Hearing on* * * * *H. R. 1181* * * *, 82nd Cong., 1st Sess., pp. 445–450 (May 15, 1951) ("*Full Committee Hearings* [*No. 21*]" hereafter); H. Rept, No. 449, 82nd Cong., 1st Sess. (May 15, 1951); I *Hearings Before the House Committee on Armed Services* [*No. 27*], *Full Committee Hearings on* * * * *H. R. 1181* * * *, 82nd Cong., 1st Sess., pp. 600–602 (June 5, 1951) ("*Full Committee Hearings* [*No. 27*]" hereafter); 97 Cong. Rec. 7588–7589 (July 2, 1951); IV *Hearings Before the Senate Committee on Armed Services, Subcommittee Hearing on H. R. 1181*, 82nd Cong., 1st Sess. (September 17, 1951) ("*Senate Subcommittee Hearings*" hereafter); Sen. Rept. No. 788, 82nd Cong., 1st Sess. (September 20, 1951); 97 Cong. Rec. 12409 (October 1, 1951); Sen. Rept. No. 923, 82nd Cong., 1st Sess. (October 8, 1951); 97 Cong. Rec. 12964–12966 (October 11, 1951).

[3] See Main Br. 35–42. The committee reports preceding the enactment of the Legislative Reorganization Act of 1946, although issued prior to the inclusion of the provision for boards

emphasized when the proposal to amend Section 207 was considered in 1951.[4] As enacted in 1946, the statute read as follows (60 Stat. 837):

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for the correction of military records in any bill, are illuminating in considering whether Congress later intended that such administrative corrections be final and non-reviewable. These reports state in pertinent part (emphasis added):

2. DELEGATION OF PRIVATE CLAIMS

Recommendations: That Congress delegate authority to the Federal courts and to the Court of Claims to hear and settle claims against the Federal Government; and that *Government agencies and departments* be empowered to handle local and private matters now provided for in private bills, such as private pension bills and legislation authorizing construction of bridges over navigable streams.

* * * * *

The United States courts are well able and equipped to hear these [private] claims [against the Government] and to decide them with justice and equity both to the Government and to the claimants. We, therefore, recommend that all claims for damages against the Government be transferred by law to the United States Court of Claims and to the United States district courts for proper adjudication.

We further recommend that private pension bills and other bills dealing with *purely local and private matters*, including the authority to construct bridges over navigable streams, be delegated to the *proper agencies of government for final determination.*

Report of the Joint Committee on the Organization of Congress, Sen. Rept. No. 1011, H. Rept. No. 1675, 79th Cong., 2d Sess., p. 25.

[4] See, *e. g.*, *Subcommittee Hearings* [No. 19] at 367:

* * * [T]his function which the Department now performs under section 207 is a function which the Congress itself performed throughout the history of this country up until the time section 207 was passed. In other words, nobody got a record corrected, nobody got paid under the circumstances of these cases, unless and until there was a private

> SEC. 207. The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice.

It was apparently thought at the time of enactment that this language conferred sufficient authority upon

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relief bill passed for that particular case, prior to August 1, 1946, when these boards were set up.

See also *id.* at 369, 370, 371, 374, 376, 378; *Full Committee Hearings* [*No. 21*] at 448; 97 Cong. Rec. 7588–7589. Senate Report No. 788, 82nd Cong., 1st Sess., notes, at p. 1, that "[p]rior to 1946, corrections in military and naval records could be made only when authorized by a private bill enacted by the Congress."

Jones ignores this important factor completely in his discussion of whether military discharges were subject to judicial review prior to the enactment of Section 207. It is apparently the failure to appreciate the significance of the congressional assumption of jurisdiction in this field which causes him to assert that the history of the "general policy of immunity of military discharges from judicial review" may not be relied upon in interpreting congressional intent in enacting Section 207 and the 1951 amendment thereto because there has been no showing that "the legal development * * * was ever specifically communicated to Congress" (57 Col. L. Rev. at 965, note 192). No such "communication" was, of course, necessary, since the "general policy" was that of Congress itself, manifested in the enactment of private relief acts. This failure is also apparently responsible for the ease with which Jones infers a congressional intent to accord judicial review in a previously non-reviewable area from the generalized and inconclusive language of two Congressmen at the subcommittee hearings quoted at 57 Col. L. Rev. at 968. See also *infra*, pp. 8 *ff*, 14–16.

the Secretaries, acting through the correction boards, to provide the identical measure of relief that Congress had previously provided through private relief acts. See 41 Op. A. G. No. 1. In 1948, however, the Comptroller General ruled that the statute empowered the Secretaries only to correct the record itself, and did not empower the agencies concerned to take the further step of making payments of monies to which the claimant might become entitled, as a matter of law, as a result of the correction. See 27 Comp. Gen. 665; 27 Comp. Gen. 709.

When this ruling was called to the attention of Congress, bills were introduced to amend Section 207 so as to authorize such administrative payments, in order to complete the transfer of congressional functions in this area to the Secretaries, acting in their discretion through the correction boards.[5] The bill which went through hearings to final enactment[6]

[5] The problem which these bills, resulting in the 1951 amendment, were thus intended to remedy is of course not involved in the present cases, since petitioners Harmon and Abramowitz would not be entitled to any payments beyond those already made, even if their discharges were upgraded to Honorable. See Main Br. 59–60.

We are informed by the Department of the Army that petitioner Harmon has been paid the monies to which he became entitled when his discharge was upgraded from Undesirable to General. We are further informed, contrary to Harmon's repeated assertions that he has never in fact received the proffered General Discharge certificate and accompanying DD Form 214, that the Department of the Army sent these documents, in the form set forth at H. R. 111–112, to Harmon, by letter dated February 15, 1957, registered receipt number 1160429.

[6] Originally H. R. 6813, 81st Cong., 2d Sess., printed in *Subcommittee Hearings* [*No. 212*], pp. 7239–7240; subsequently renumbered H. R. 1181, 82nd Cong., 1st Sess.

would have reenacted the original authorization to correct records as subsection (a), and added three new subsections. Subsection (b) would have authorized the Secretary concerned or his designee "to settle and pay * * * claims * * * of amounts * * * found to be due * * * as a result of" such corrections. Subsection (c) provided as follows:

> (c) The acceptance by the claimant of any settlement made pursuant to subsection (b) of this section shall constitute a complete release by the claimant of any claim against the United States on account of such correction of record and such settlement shall be final and conclusive on all officers of the Government including review by the courts of the United States, except when procured by means of fraud.

Three features of the bill are noteworthy for present purposes. First, the Secretaries were to perform two distinct functions: decide claims on their merits, as before, under subsection (a), and "settle and pay" claims resulting from corrections, under subsection (b). Second, under subsection (c), the claimant's acceptance of the *settlement* (the second of the Secretaries' functions), arrived at pursuant to the subsection (b), was to constitute a release of any claims based upon the record as corrected. Finally, the *settlement* under subsection (b) was to be "final and conclusive on all officers of the Government" and not subject to judicial review, in the absence of fraud. See *Subcommittee Hearings* [*No. 212*], p. 7243. Subsection (a) thus dealt exclusively with determinations on the merits as to whether or not the record should be corrected—with which we are concerned in the present

cases—while subsections (b) and (c) dealt exclusively with money settlements based upon records which had been corrected.

2. The thrust of Jones' contentions, in his article in the Columbia Law Review, is that, when Congress rejected the amendatory wording "including review by the courts of the United States" and stated through the Committee that "under appropriate circumstances" judicial review should be permitted,[7] Congress intended that the Secretary's actions on applications for correction of military records be subject to review by the courts. That this contention is without merit seems to us plain. As we have just pointed out (*supra*, p. 7), the amendatory language—"shall be final and conclusive * * * including review by the courts * * *"—was introduced with reference only to subsection (b), the money settlement section, and not with reference to subsection (a), which grants unrestricted power to the Secretaries to make corrections where in their judgment such action will remedy injustice or error. Moreover, the legislative history, read as a whole, demonstrates that the true significance of Congress' failure to adopt the nonreviewability provision was simply to protect the jurisdiction and functions of the General Accounting Office and the Court of Claims in interpreting and applying *money* statutes.

The chief problem which the committees faced in considering the proposed amendment arose from the General Accounting Office's objection that the pro-

[7] See *Full Committee Hearing* [*No. 21*], p. 450; H. Rept. No. 449, 82nd Cong., 1st Sess., p. 3.

posal to make money settlements by the correction boards final and conclusive on all officers of the Government, including review by the courts, constituted an unwarranted interference with the jurisdiction of the Comptroller General. Mr. John T. Burns, of the Office of the General Counsel of the General Accounting Office, defined the problem for the subcommittee as follows (*Subcommittee Hearings* [*No. 19*]; emphasis added):

> Of course there are really two different things here, and I think it is well to keep that in mind. One thing is the determination, the correction of the record; and the other thing is the settlement based on that correction. *Subsection (a) would give the head of the Department the authority to make the correction. We do not want to challenge that authority. We do not want to say it is not final and conclusive, with or without this language in subsection (c).* [P. 377.]
>
> * * * * *
>
> In other words, we are not going to question their determination, even in the case of the man who was given 2 years' additional longevity so that those 2 years add to his pay for the rest of his life. We would not question their authority to make such a correction.
>
> * * * * *
>
> * * * But we think that this [amendatory finality] language would take away our authority to *pass on the computation of the payment,* for example. [P. 369.]
>
> * * * * *

> Mr. DOYLE. * * * Then if you do not want to question their authority and jurisdiction to correct the record, what is it you wish to question?
>
> Mr. BURNS. Question their authority to settle and pay out of applicable current appropriations claims of any persons, *based on those corrections*. [P. 377.]
>
> * * * * * * *
>
> * * * If the clerks in the General Accounting Office made a mathematical error or if the clerks in the Department of Defense made such error we would not want the settlement based thereon to be conclusive on the Government. We would not have anything to do with any conclusions of fact as such. [P. 378.]

The Department of Defense, on the other hand, expressed its concern that, if the finality provision were stricken from the bill, the General Accounting Office, despite its disclaimers, might invade the jurisdiction of the Secretaries to determine claims for corrections on their merits instead of restricting itself to its auditing function. See *Subcommittee Hearings* [*No. 19*], pp. 362–363, 386–392. The departmental representatives stressed the "plenary powers in these boards to decide on the merits" (*id.* at 362, 363), and the fact that the discretionary nature of the determinations on the merits made them inappropriate for review outside the Service Departments (*id.* at 389).

The House committee resolved this inter-agency conflict to the satisfaction of all concerned by the simple expedient of striking the nonreviewability clause (*Full Committee Hearings* [*No. 21*], p. 450; *Full*

Committee Hearings [*No. 27*], pp. 601–602) and transferring the finality language from subsection (c) to subsection (a), thereby making the finality clause applicable to the Secretaries' determinations on the merits. As the subcommittee spokesman explained: "Now, before, that pertained to the payment and not to the correction. I think it is a good amendment" (*id.* at 601).

The effect of these changes in the original bill was clearly delineated in a colloquy between Representative Vinson, the Chairman of the full Committee, and Representative Smart, the spokesman for the subcommittee, when the bill again came under discussion in the full Committee after the issuance of the committee report.[8] In our view, the following discussion makes it plain that Congress intended that the authority of the Secretary to grant or deny an application for correction remained final and conclusive, without any review power in the courts or elsewhere[9] (*id.* at 600–601; emphasis added):

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[8] Jones makes no reference to this hearing session. Since it took place after the bill was reported, it is possible that he overlooked it.

[9] This colloquy has been called to the Court's attention in the Government's Petition for a Writ of Certiorari to the United States Court of Claims in *United States* v. *Thomas L. Suter*, No. 620, this Term, at p. 13, note 18. That petition outlines at length the many considerations underlying the Government's position that correction board determinations on the merits are not, and were not intended to be, subject to review by the courts. It further points out that the Government has heretofore not been in a position to seek review in this Court of the assumption by the Court of Claims of jurisdiction to review correction board decisions, as asserted in the cases relied upon by Jones at 57 Col. L. Rev. at 970–971.

Mr. SMART. Mr. Chairman, may I first make this brief observation. *When the bill was reported by the subcommittee it was the intention of the committee that the jurisdiction over cases to correct military records and the determination of the cases on their merits be exclusive and final in the Board which made such corrections but that the normal auditing authority of the Comptroller be not disturbed.*

The committee was of the opinion, and we had witnesses here from the Comptroller General's Office, that it had accomplished that. Subsequent to the reporting of the bill by the committee, on the 25th of May, the Comptroller General directed a letter to Mr. Vinson, the chairman, stating he did not feel that the committee had accomplished its purpose and suggested certain technical amendments to go in the bill, three in number, which he felt would accomplish that purpose.

I immediately submitted those amendments to the Defense Department for their consideration and I have back a letter today from the Office of the Assistant Secretary of Defense dated June 4, wherein they accept the amendments and interpose no objection to them.

The CHAIRMAN. *Now, does it go into the question of the finding on the merit by the Department? That is final and conclusive?*

Mr. SMART. *That is correct sir.*

The CHAIRMAN. That is right. *We want to keep it that way.* But it merely gives the Comptroller the authority to audit what?

Mr. SMART. Audit the payment.

The CHAIRMAN. Audit the payment.

Mr. SMART. *So the determination of the*

merits as to whether or not a record should be corrected is final and conclusive by the Board.

The CHAIRMAN. *That is right.*

The foregoing legislative history clearly defines the "appropriate circumstances" (the term the full committee used) which Congress envisaged for judicial review, *i. e.*, purely and simply the question of the determination and computation of the *amounts* due as a result of a correction made by the Secretary. In such circumstances, the Act as finally passed reserved this limited review power to both the General Accounting Office and the courts.[10] Plainly, removing the

[10] As amended by the 1951 enactment, the statute read as follows, in pertinent part (65 Stat. 655, 656):

SEC. 207. (a) The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * *.

(b) The Department concerned is authorized to pay, out of applicable current appropriations, claims of any persons, their heirs at law or legal representatives as hereinafter provided, of amounts paid as fines, forfeitures, or for losses of pay (including retired or retirement pay), allowances, compensation, emoluments, or other monetary benefits, as the case may be, which are found to be due on account of military or naval service as a result of the action heretofore taken pursuant to section 207 of the Legislative Reorganization Act of 1946, or hereafter taken pursuant to subsection (a) of this section * * *.

(c) The acceptance by the claimant of any settlement made pursuant to subsection (b) of this section shall con-

proposed bar to review of *money settlements* by the courts and permitting review "under appropriate circumstances" had no relation to situations, such as those here, where no correction is made by the Secretary and, on the contrary, he declines to alter the record. However, once the Secretary has effected a correction which by its nature would entitle the applicant to recover money from the United States, under the statute as amended he cannot deny the applicant the moneys to which his entitlement under the law has been established by the Secretary.[11] These are the "appropriate circumstances" for review, traditional in the Court of Claims, to which the legislative history of the amendment had reference.

3. In support of his far broader interpretation of the action of Congress in striking the nonreviewability clause, Jones relies almost exclusively upon a colloquy which took place in the subcommittee hearing and involved two Congressmen (57 Col. L. Rev. at 968, quoting from *Subcommittee Hearings* [*No. 19*], pp. 391–393). Concededly, some of that language of the two Congressmen is susceptible to a broad reading. But, insofar as this is true, the discussion cited was not germane to the question then under discussion—whether the nonreviewability clause of subsection (c), relating solely to money settlements, should be retained or stricken. Moreover, if it was the intention

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stitute a complete release by the claimant of any claim against the United States on account of such correction of record.

[11] The Comptroller General has so interpreted the 1951 amendment. 33 Comp. Gen. 1; 34 Comp. Gen. 7.

of these two members of the subcommittee to take the relatively significant step of subjecting to judicial review, for the first time, the Secretaries' determinations *on the merits* of all applications for the correction of records, this intention was communicated neither to the full committee, to the House, nor to the Senate. Nor did Representative Smart, the spokesman for the subcommittee, indicate that he had any such view; and the same is true of Representative Vinson, the chairman of the full committee. See *supra,* pp. 11–13. As we have noted, *supra,* p. 8, both the full committee and the House, through the committee report, were apprised only that the nonreviewability-of-settlements clause had been stricken to provide court review "under appropriate circumstances". In explaining the bill on the floor of the House, Chairman Vinson did not even hint that the bill, if enacted, would permit general judicial review of correction board decisions. To the contrary, he informed the House that "in amending section 207 of the Legislative Reorganization Act, we have provided that the respective boards for the correction of military or naval records shall rule upon questions of jurisdiction over claims and the merits of such claim, and that such ruling will be final and conclusive on all officers of the Government, except when procured by means of fraud" (97 Cong. Rec. 7589).

In the Senate hearings, there was again no discussion of judicial review, the subcommittee being informed instead that the bill as passed by the House "provides that corrections made are final and conclu-

sive except where procured by fraud" (*Senate Subcommittee Hearings,* p. 9). The resulting Senate committee report similarly contained no mention of the role of the courts, or of the House action in striking the proposed nonreview clause, stating simply that "[c]orrections made by the boards are conclusive on all officers of the Government except when procured by means of fraud" (Sen. Rept. No. 788, 82nd Cong., 1st Sess., p. 2). And the Senate debates (97 Cong. Rec. 12409, 12964–12966), as well as a second Senate committee report (Sen. Rept. No. 923, 82nd Cong., 1st Sess.), are likewise devoid of references to court review, much less of statements that full judicial review of the merits of a determination was intended. Instead, they make it clear that the bill related solely to persons who had succeeded in having their records corrected but who had theretofore been unable to obtain payments based upon the corrections (Sen. Rept. 788, 82nd Cong., 1st Sess., pp. 1–2; 97 Cong. Rec. 12409, 12964–12965).

In these circumstances, the action of both houses of Congress in enacting the 1951 amendment, without the proposed limitation on judicial review of settlements, must be interpreted only as intended to permit judicial review of money "settlements" under the "appropriate circumstances" which we have outlined *supra* at pp. 8 *ff*, 13–14. The limited review thus permitted does not extend to the circumstances of these cases, where the respondent in his discretion has declined to alter the petitioners' records in the manner requested, and there have accordingly been no settlements.

Respectfully submitted,

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Department of the Army.

JANUARY 1958.

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Supplemental Memo for the Respondent After Argument

No
80
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON III, PETITIONER

v.

WILBER M. BRUCKER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY

No. 141

HOWARD D. ABRAMOWITZ, PETITIONER

v.

WILBER M. BRUCKER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT AFTER ARGUMENT

I

A. In accordance with the statement of counsel at the oral argument of these cases, the Government is submitting herewith copies of the following Army Regulations, Memoranda, and directives relating to the discharge or separation of enlisted personnel:—

(1) Army Regulations 615–360, entitled "Enlisted Personnel—Discharge—General Provisions", June 24, 1953, together with Changes No. 1, 2, 3, and 4 to those Regulations.[1]

(2) Army Regulations 604–10, entitled "Military Personnel Security Program", July 29, 1955, and Changes No. 1 and 2 to those Regulations.[2]

(3) The following memoranda relating to changes in Department of Defense Directive No. 5210.9[3] and the review of discharges issued under the Military Personnel Security Program:

(a) Department of the Army Memorandum dated October 17, 1955.

(b) Changes made in DOD Directive 5210.9 on 16 November 1955.

(c) Memorandum from the Secretary of Defense dated January 11, 1956.

(d) Memorandum from the Assistant Secretary of the Army dated March 1, 1956.

(e) Statement of policy relating to amendments to the Military Personnel Security Program dated March 1, 1956.

B. Petitioners have never claimed that any regulations or directives were violated in effecting their

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[1] Paragraphs 7 through 9 of these regulations, as originally issued, are printed at Pet. Br. 52–54 in No. 80. AR 615–360 is referred to or discussed at Pet. Br. 2, 11, 27, 31, 33, 37 and 48, in No. 80, and at pp. 32 and 60 of the Brief for the Respondent.

[2] These regulations, as originally issued, are printed in pertinent part at Pet. Br. 37–50 in No. 141.

[3] This Directive, as originally issued, together with the covering Memorandum of the Secretary of Defense, is printed at R. 32–45 in No. 80.

respective discharges (see our main brief, p. 34). The only challenge in both cases is to the validity, under the applicable statutes and the Constitution, of the admittedly-applicable regulatory provisions which required consideration of the gravity of derogatory information, including information relating to pre-induction activities, in determining the character of the discharges issued to petitioners. We shall nevertheless set out, for the Court's convenience, a summary of the regulations and directives which were in force on the date of Harmon's original Undesirable Discharge (June 2, 1954), Abramowitz's Undesirable Discharge (September 13, 1955), Harmon's General Discharge (Under Honorable Conditions) (June 6, 1956), and the rejection of Abramowitz's request for review by the Army Board for the Correction of Military Records (September 7, 1956).

1. Petitioner Harmon was given an Undesirable Discharge on June 2, 1954, pursuant to Department of Defense Directive No. 5210.9, *supra* (see R. 98–99 in No. 80), which had been issued on April 7, 1954. This Directive established the Military Personnel Security Program. Section VIII (F) (5) of the Directive (R. 43 in No. 80) required that the character of separations or discharges effected thereunder "be predicated upon the gravity of the reasonably substantiated information in derogation". This provision of Department of Defense Directive No. 5210.9, directed to all the Armed Services, effectively modified the existing provisions of Army Regulations 615–360, as amended (transmitted herewith, with changes), *supra,*

setting forth the general provisions relating to Army discharges. As the Court noted at the oral argument, paragraph 8 of these regulations (AR 615–360) required that persons with character and efficiency ratings such as petitioners' should be issued Honorable Discharges, "except as provided in these regulations and pertinent regulations listed in paragraph 13 * * *." At the time of Harmon's discharge, the actual terms of paragraph 13 permitted less-than-Honorable Discharges to soldiers discharged on grounds, *inter alia*, of loyalty or subversion, and made no explicit reference to security cases. Section VIII (F) (5) of Directive No. 5210.9 in effect provided, however, an additional exception to paragraph 8 to permit less-than-Honorable Discharges in security cases.[4] In any event, the initial discharge issued to Harmon is no longer in issue due to the subsequent changes in that discharge.

2. By the time Abramowitz was issued his Undesirable Discharge on September 13, 1955, the Department of the Army had formally implemented Department of Defense Directive No. 5210.9 by issuing Spe-

[4] Petitioner Harmon has never contested the ruling of the District Court that this Directive "modified existing regulations of the Armed Services so as to make the civilian security program for government employees apply to the military" (R. 100), or the similar holding of the Court of Appeals (R. 117). See petitioner's statement of the Questions Presented, Pet. Br. 2–4 in No. 80. Thus, we pointed out in our main brief at p. 34 that petitioner did not assert that his discharge was in violation of existing regulations (including Army Regulations 615–360), but only that the pertinent regulation (Directive No. 5210.9), which was concededly properly applied to Harmon's case, was itself invalid.

cial Regulations 600–220–1, entitled "Military Personnel Security Program", on June 18, 1954,[5] and had superseded these regulations with Army Regulations 604–10 ("Military Personnel Security Program", *supra*), issued July 29, 1955.[6] Paragraph 19 of AR 604–10 provided, with exceptions not here pertinent, that the character of a discharge issued under its provisions (as was Abramowitz's discharge) should "be predicated upon the gravity of the reasonably substantiated information in derogation".

3. On October 17, 1955, the Department of the Army issued a Memorandum, transmitted herewith, outlining a modified policy for the application of the existing provisions of AR 604–10. On November 16, 1955, Section VIII (F) (5) of Department of Defense Directive No. 5210.9 was amended (see attachment) to provide that the character of separations in security cases should "be predicated upon a careful consideration of all pertinent factors including the gravity of substantiated derogatory information and the character of the service performed". The Secre-

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[5] The issuance of SR 600–220–1 was followed by Changes No. 4 to AR 615–360, which superseded the reference in paragraph 13 thereof to the "disloyal or subversive" regulation (AR 615–370) with a reference to SR 600–220–1.

[6] As noted in the briefs of both the petitioner in No. 141 (at pp. 5 and 31) and the respondent (at p. 12, note 7), AR 604–10 is identical with SR 600–220–1 for present purposes. For this reason, and because SR 600–220–1 was not in effect at the time of any of the actions here in question, SR 600–220–1 is not being transmitted to the Court, but is available for transmittal together with any additional regulations the Court may wish to have.

tary of Defense issued a Memorandum on January 11, 1956, also transmitted herewith, interpreting this amendment as requiring that the discharge be predicated solely upon the character of service rendered (including post-induction subversive activities) in cases where the soldier had been thoroughly investigated prior to induction and had completed his term of service.[7] On March 1, 1956, Assistant Secretary of the Army Hugh M. Milton II directed that the Army Discharge Review Board conduct a review of all military personnel security cases which resulted in General or Undesirable Discharges between November 10, 1948 and November 16, 1955, in order to determine whether a change in the type of discharge might be warranted (see attachment). The review was to be conducted in the light of the changed regulations and policies just cited, as implemented by the statement of policy attached to the Assistant Secretary's Memorandum of March 1st. This review resulted in the upgrading of Harmon's discharge to General (Under Honorable Conditions) on June 6, 1956. It will be noted that, in cases such as Harmon's, the existing regulations and policies still permitted the consideration of pre-induction activities in determining the character of discharge, although the character of his service was also to be considered

[7] Neither Harmon nor Abramowitz had been so investigated prior to induction; Harmon was discharged prior to the expiration of his term of active service and Abramowitz was discharged prior to the expiration of his Reserve service.

under the November 16, 1955 amendment to Department of Defense Directive No. 5210.9.

4. The Army Board for the Correction of Military Records rejected petitioner Abramowitz's request for review of his discharge on September 7, 1956 (see R. 21–22 in No. 141). Prior thereto, on June 12, 1956, Changes No. 2 to AR 604–10 had been issued. Section 19 (a) (3) of this amendment provided as follows:

> Members of the United States Army Reserve and National Guard of the United States not on active duty who are discharged prior to the completion of their term of service will be issued a discharge based on the gravity of the substantiated derogatory information (regarding matters occurring prior to and during their period of service) which requires their discharge and upon the character of service performed.

II

In addition to the foregoing materials requested by the Court, we are transmitting the following documents to which counsel referred in oral argument and which he stated would be lodged with the Clerk:

(1) Army Regulations 345–20, "Records—Release of Information and Records from Army Files", dated March 9, 1956. The Court's attention is particularly directed to the following sections: I (2) (a) (1); II (6) (a) (6); II (9) (a) (2), (10) and (12); III (13); IV (15) (e); and IV (17) (a) (3).

(2) Office Regulations, The Adjutant General's Office, Part Two, 13 June 1952, pp. 3, 30, implement-

ing Army Regulations 345–20, with respect to the release of information from Army records.

(3) Annual Report of Attorney General (N. Y.), 1920, page 184; 24 State Department Reports (N. Y.) 212, dated October 18, 1920, relating to the type of military discharge required for entitlement to the benefits provided by Section 32 of the General Business Law of New York, as amended.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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